

Title: Jefferson County, Alabama, Petitioner
v.
William M. Acker, Jr., Senior Judge, United States
District Court, Northern District of Alabama, and U.
W. Clemon, Judge, United States District Court,
Northern District of Alabama

Docketed:
June 29, 1998

Court: United States Court of Appeals for
the Eleventh Circuit

Entry	Date	Proceedings and Orders

	Jun 25 1998	Petition for writ of certiorari filed. (Response due October 19, 1998)
	Jul 17 1998	Waiver of right of respondents William M. Acker, et al. to respond filed.
	Jul 17 1998	Order extending time to file response to petition until August 10, 1998.
	Aug 10 1998	Brief of respondent U. W. Clemon in opposition filed.
	Aug 26 1998	DISTRIBUTED. September 28, 1998
	Sep 24 1998	Response requested from respondent Acker, William M. (Due October 9, 1998).
	Oct 2 1998	Order further extending time to file response to petition until October 19, 1998.
	Oct 19 1998	Brief of respondents William M. Acker, et al. in opposition filed.
	Nov 4 1998	REDISTRIBUTED. November 25, 1998
	Nov 30 1998	REDISTRIBUTED. December 4, 1998
	Dec 7 1998	Petition GRANTED. limited to the following questions: 1. Whether the District Court had subject matter jurisdiction over this action, in light of the Tax Injunction Act, 28 U.S.C. Sec. 1341. 2. Whether a County privilege/occupational tax levied upon the pay or compensation of an Article III judge violates the Supremacy Clause. SET FOR ARGUMENT March 29, 1999. *****
	Jan 13 1999	Motion of the parties to dispense with printing the joint appendix filed.
	Jan 21 1999	Brief amicus curiae of United States filed.
	Jan 21 1999	Brief of petitioner Jefferson County, Alabama filed.
	Jan 22 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 25 1999	Motion of the parties to dispense with printing the joint appendix GRANTED.
	Feb 11 1999	CIRCULATED.
	Feb 18 1999	LODGING consisting of a copy of a U.S. amicus brief filed with the Ninth Circuit submitted by counsel for the amici Seven Judges, and distributed.
	Feb 19 1999	Brief amici curiae of Seven US District Judges of the Northern District of Alabama filed.
	Feb 22 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Entry Date

Proceedings and Orders

Feb 22 1999 Brief of respondents William M. Acker, et al. filed.
Feb 22 1999 LODGING consisting of a copy of an ordinance of the City
 of Birmingham submitted by counsel for the respondent
 and distributed.
Mar 16 1999 Record filed.
Mar 18 1999 Reply brief of petitioner Jefferson County, Alabama filed.
Mar 22 1999 LODGING consisting of twenty copies of an ordinance of
 the City of Louisville submitted by counsel for the
 petitioner and distributed.
Mar 24 1999 Letter from counsel for respondents received and
 distributed.
Mar 25 1999 Record filed.
Mar 25 1999 Letter from counsel for the petitioner received and
 distributed.
Mar 29 1999 ARGUED.

98 10 JUN 25 1998

No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM ACKER and U. W. CLEMON,

Respondents.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

EDWIN A. STRICKLAND

JEFFREY M. SEWELL

Counsel of Record

Jefferson County Attorney's Office

214 Jefferson County Courthouse

716 North 21st Street

Birmingham, AL 35263

(205) 325-5688

227 P²

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the absence of the United States Government as a party forecloses the judicial exception to the Tax Injunction Act resulting in no federal jurisdiction.
- II. Whether a County privilege/occupational tax levied upon the income of an Article III judge is a direct tax on the United States in violation of the Supremacy Clause.

**PARTIES TO THE PROCEEDINGS BELOW AND
CERTIFICATE OF INTERESTED PERSONS**

Petitioner	Jefferson County, Alabama.
Petitioner's Counsel	Edwin A. Strickland Jeffrey M. Sewell
Respondents	William Acker U. W. Clemon
Respondents' Counsel	Irwin Stolz Seaton Purdhom
Trial Judge	Honorable Charles A. Moye, Jr., Senior United States District Judge
En Banc Eleventh Circuit Court of Appeals	Hon. Gerald Bard Tjoflat Hon. Phyllis A. Kravitch Hon. Joseph W. Hatchett Hon. R. Lanier Anderson, III Hon. J. L. Edmondson Hon. Emmett R. Cox Hon. Stanley F. Birch, Jr. Hon. Joel F. Dubina Hon. Susan H. Black Hon. Ed Carnes Hon. Rosemary Barkett Hon. Albert J. Henderson

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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**CITATIONS OF THE OPINIONS AND JUDGMENTS
ENTERED IN THE COURTS BELOW**

The opinions and judgments entered in the courts below are contained in the appendix to this brief.



STATEMENT FOR BASIS OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. This is a petition for certiorari from an en banc decision of the United States Court of Appeals for the Eleventh Circuit.

(i) Date of en banc judgment: March 27, 1998.

(ii) No application for rehearing filed.

(iii) No cross petition filed.

(iv) Appellate Jurisdiction is conferred by 28 U.S.C. § 1254(1) and Rule 10 (a) and (c) of the Rules of the United States Supreme Court.

(v) The judgment below effectively declared the Buck Act, 4 U.S.C. § 106-110 and the Public Salary Act, 4 U.S.C. § 111 to be unconstitutional as applied to Article III judges. Neither the United States, nor any federal department, office, agency, officer or employee is a party to this case. The United States Court of Appeals did not certify to the Attorney General the fact that the constitutionality of these acts of Congress were drawn into question. Accordingly, this petition was served on the Solicitor General of the United States, Room 5614,

Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

**STATEMENT OF CONSTITUTIONAL
PROVISIONS, STATUTES AND
ORDINANCES INVOLVED IN THE CASE**

The provisions involved are lengthy. Accordingly, only their citations are provided below. The verbatim text is contained in the appendix.

- i. The supremacy clause, Article VI, United States Constitution.
- ii. The Buck Act, 4 U.S.C. § 106-110.
- iii. The Public Salary Act, 4 U.S.C. § 111.
- iv. The Tax Injunction Act, 28 U.S.C. § 1341.
- v. 5 U.S.C. § 5520.
- vi. 31 CFR § 215.2.
- vii. Alabama Act 406 (1967).
- viii. Jefferson County, Alabama Ordinance No. 1120.
- ix. The Alabama State Business License Code, §§ 40-12-1, *et seq.*, Alabama Code (1975).

STATEMENT OF THE CASE

(I) Nature of Case, Course of Proceedings and Disposition.

Respondents William Acker and U. W. Clemon are active duty Article III judges in the Northern District of

Alabama. They refused to pay the County's occupational tax which was authorized by Alabama Act 406 (1967) [hereafter "Act 406"] and implemented by County Ordinance 1120, effective January 1, 1988. The occupational tax is levied at the rate of one-half of one percent (.005%) of the gross receipts earned in the geographic boundary of the County by individuals who are not required to purchase a state business license pursuant to the state business license code codified at § 40-12-1 *et seq.*, Ala. Code (1975). The occupational tax is collected from hundreds of thousands of persons who work in the County.

The County filed suit against respondents in the state small claims court. Respondents removed the cases to the United States District Court for the Northern District of Alabama. The cases were consolidated and specially assigned to the Honorable Charles A. Moye, Jr., Senior District Judge, from the State of Georgia. The County timely filed a Motion to Remand asserting that federal jurisdiction was barred by the Tax Injunction Act, 28 U.S.C. § 1341. The motion was denied.

As the case involved only questions of law and since the material facts were undisputed, the case was submitted to the trial court on stipulated facts and cross motions for summary judgment. The trial court entered a final order denying the County's motion for summary judgment and granting Respondents' motion for summary judgment. The trial court held that, as applied to federal judges, the County occupational tax is a "franchise tax imposed upon the federal judiciary operations and is unconstitutional as a direct tax upon an officer and instrumentality of the United States, that is, upon the sovereign itself." 800 F.Supp. at 1545, 46. The trial court

also held that the County occupational tax "constitutes an unconstitutional diminution of the defendants' compensation and is invalid as to them." 805 F.Supp. at 1548. In effect, the trial court held that the Buck Act and Public Salary Act are unconstitutional as applied to federal judges. That is, the supremacy clause of Article VI and the compensation clause of Article III, United States Constitution, deprive Congress of the power to consent to the levy of a municipal tax on the compensation of Article III judges.

The County appealed. The case was assigned to a three judge panel of the Eleventh Circuit Court of Appeals. After briefing and oral argument the panel reversed the trial court and held the levy of the tax on Respondents' compensation did not violate the supremacy clause or the compensation clause of the United States Constitution and remanded the case for determination of the amount of tax owed. 61 F.3d 848.

The Court of Appeals granted en banc rehearing. 73 F.3d 1066. After rebriefing and oral argument, the divided¹ court of appeals held that the County tax on federal judges is a direct tax on the federal government or its instrumentalities in violation of the intergovernmental tax immunity doctrine.² 92 F.3d 1561.

The County then filed a petition for certiorari which was granted by this Court. This Court requested the

¹ En banc 9 judges to 3 judges.

² The Court of Appeals expressly declined to address whether the County tax unconstitutionally diminishes federal judges' compensation.

United States to file an *amicus* brief. The Attorney General and Solicitor General filed an *amicus* brief urging this Court to grant the petition and reverse the Court of Appeals.³ The Attorney General and Solicitor General also suggested that this Court examine the existence of federal jurisdiction. This Court vacated the court of appeals' decision and remanded the case for consideration of federal jurisdiction in light of this Court's holding in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 177 S.Ct. 1776 (1997). See *Jefferson County v. Acker*, ___ U.S. ___, 117 S.Ct. 2429, 138 L.Ed.2d 191 (1997).

The court of appeals has now entered a supplemental opinion holding that federal judges are instrumentalities of the United States and are entitled to utilize the judicial exception to the Tax Injunction Act notwithstanding the absence of the United States as a party. 137 F.3d 1314. Having found the existence of federal jurisdiction, the court of appeals reinstated its prior en banc opinion, this time with an additional dissenting judge. This appeal follows.

(II) Stipulated Facts

The undisputed material facts were stipulated by the parties as follows:

1. Alabama Act 406 (1967) authorizes Jefferson County, Alabama, to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by

³ The *amicus* brief is reproduced in the appendix.

state law to pay a privilege, license or occupational tax to the State of Alabama.

2. In 1987, the Jefferson County Commission, the governing body of the County, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the County not required by state law to pay a privilege, license or occupational tax to the state.

Section 2 of Jefferson County Ordinance No. 1120 provides:

[i]t shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the county . . . without paying license fees for the privilege of engaging in or following such vocation, occupation, calling or profession . . .

Section 1, Definitions, subsection (C), provides:

[t]he words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

3. The effective date of the ordinance was January 1, 1988. The County Occupational Tax is measured at the rate of one-half of one percent (.005%) of the gross receipts earned within the geographic boundary of Jefferson County, Alabama.

4. At all times since January 1, 1988, defendants have been employed by the United States of America as District Judges for the Northern District of Alabama pursuant to Article III of the Constitution of the United States.

5. The Northern District of Alabama is composed of 31 counties, including Jefferson County.

6. Defendants maintained their principal offices at the Hugo Black Federal Courthouse in the City of Birmingham, Jefferson County, Alabama.

7. Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama.

8. Ordinance No. 1120, section 3, provides:

[i]n cases where compensation is earned as a result of work done or services performed both within and without the County, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Since the effective date, neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama, has ever made an oath certifying the alleged amounts of a federal judge's salary earned within and without Jefferson County.

9. Defendants are not required by any state law to pay any privilege, license or occupational tax to the State of Alabama. Defendants, however, still pay their dues

(one-half of the dues of a licensed practicing attorney) to the Alabama State Bar, which is an integrated bar, and, as such, is an arm or agency of the State of Alabama. Although defendants are not and cannot be licensed to practice law, they remain sustaining or auxiliary members of the bar as they still pay their dues.

10. The Administrative Office of the United States Courts has never withheld County Occupational Tax from any federal judge or court employee pursuant to the provisions of Ordinance No. 1120.

11. All active judges of the Northern District of Alabama except defendants have paid the County Occupational Tax on differing percentages of their judicial salaries to Jefferson County without supporting those percentages by an oath or by any formal accounting procedure. At least one Article III judge (not a defendant) has paid "under protest".

12. All State District and Circuit Court Judges of the Tenth Judicial Circuit of Alabama have paid the County Occupational Tax. The three Alabama Supreme Court Justices with satellite offices in Jefferson County have paid the County Occupational Tax based on portions of their salaries.

13. The Honorable Robert S. Vance, United States Circuit Judge, who served on the Court of Appeals for the Eleventh Circuit, and who, from January 1, 1988 until his death, had chambers in Jefferson County, Alabama, where he resided and spent most of his time, never paid the County Occupational Tax.

14. Since 1970, the City of Birmingham, Alabama, has imposed an occupational tax at the rate of one percent of gross receipts (twice the rate of the County tax) on persons engaged in any vocation, occupation, calling or profession within the City.

15. All active judges of the Northern District of Alabama except defendant Acker have paid the City Occupational Tax.

16. Defendant Clemon has paid the City Occupational Tax on approximately 66 percent of his gross earnings during his entire tenure as a United States District Judge.

17. Since 1962, the City of Gadsden, Alabama, where defendant Acker has regularly held court for the last 11 years, has had an occupational tax ordinance similar to the County Occupational Tax, except that it contains no exemptions. The Gadsden ordinance provides in pertinent part:

[i]t shall be unlawful for any person to engage in or follow any trade, occupation or profession, as defined in this article, within the city on and after the first day of February, 1962, without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by two (2) per cent of the gross receipts of each such person.

Gadsden, City Code, Section 7-51.

18. The City of Gadsden has made no effort to exact or to collect a license fee from any of the several Article III judges who, regularly, have sat in the Middle Division

of the Northern District of Alabama, which has its courthouse in the City of Gadsden.

19. Defendants have paid their Alabama state income taxes throughout their tenures as federal judges.

20. A final decree entered by defendant Acker as an Article III judge after January 1, 1988, has been formally attacked under Rule 60(b), Fed.R.Civ.P., as having been "unlawfully" entered because said order was entered by defendant Acker when he had not paid his license fee to Jefferson County pursuant to Ordinance No. 1120.

(III) No Basis for Federal Jurisdiction in the Courts Below

The trial court exercised jurisdiction pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(3). But, the County contested the existence of federal jurisdiction for several reasons.

First, in *Mesa v. California*, 489 U.S. 1 (1989), this Court held that a federal officer may remove a case from state court if: (1) the existence of a colorable federal defense is pled to the claim and (2) the officer is being sued for an act done under color of office or in the performance of federal duties. 489 U.S. at 136. Respondents' federal defense is that the levy of the County tax on their pay violates intergovernmental tax immunity. But, that defense was abrogated by Congress in 1939 with enactment of the Public Salary Tax Act and Buck Act wherein Congress expressly consented to the levy of county occupational tax on the pay of a federal judge. Respondents plead a federal defense which does not

exist! That does not meet the first element of the *Mesa* test.

Second, pursuant to *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953), the right to tax the pay or compensation of a federal employee is granted by federal law, not state law. And federal law, not state law, determines the taxable event. The Public Salary Tax Act and Buck Act render the county tax an income tax. The taxable event is the receipt of income. The receipt of income is not an "act performed under color of office" or "performed in connection with official duties". Neither their position, duties or office authorizes Respondents to avoid paying their lawful debts. It is axiomatic that their non-payment of lawful debts (i.e., their refusal to pay taxes required by federal and state law) cannot be an act done under color of office or in connection with the performance of their duties. Failing to pay their lawful debts is not an act which satisfies the second element of the *Mesa* test.

Third, even if federal officer removal jurisdiction could be established, it is extinguished by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341. The TIA prohibits federal courts from interfering with the assessment and collection of a state tax if the state provides a plain, speedy and efficient remedy. It is undisputed that Alabama Courts provide Respondents with such a remedy. See *Richards v. Jefferson County*, 789 F. Supp. 369, 371 (N.D. Ala. 1992), affirmed 938 F.2d 237 (11th Cir. 1992) (finding Alabama's remedies adequate for Tax Injunction Act purposes in a class action challenging the same County occupational tax). Therefore, respondents do not fit within the statutory exception to the TIA.

And, respondents do not fit within the judicial exception to the TIA created by this Court in *Dep't of Employment v. United States*, 385 U.S. 355 (1966) and clarified in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 117 S.Ct. 1776 (1997) (holding that in order for federal instrumentality to utilize judicial exception to TIA the United States must be a party). The United States Government refused to become a party in this case. Instead, when this case was last before this Court, the Attorney General and Solicitor General filed an *amicus* brief supporting the County and urging this Court to reverse the court of appeals. See *amicus* brief of United States in appendix. This Court vacated the court of appeals' decision and remanded the case for consideration of the jurisdictional issue. On remand the court of appeals refused to follow *Arkansas v. Farm Credit Services* and instead concluded that the judicial exception to the TIA applied even where the United States was not a party. The court of appeals' holding appears to be in direct conflict with this Court's holding in *Arkansas v. Farm Credit Services*. It is also in direct conflict with a decision from another court of appeal which holds that the United States Government must be a party. *Housing Authority of Seattle v. Washington Dep't of Revenue*, 629 F.2d 1307, 1311 (9th Cir. 1980).

ARGUMENT ON THE MERITS

This is a case of FIRST IMPRESSION

In this case a divided court of appeals immunized Article III judges from a County occupational tax paid by hundreds of thousands of persons who work in Jefferson

County, Alabama, including state Supreme Court justices and all state trial court judges. The court of appeals held that federal judges are instrumentalities of the United States when receiving income and that a tax on their income is tantamount to direct tax upon the United States in violation of the Supremacy Clause. Instead of focusing on the real issue of whether Congress has consented to the levy of this tax on these judges via the Public Salary Tax Act; the Buck Act; and, 5 U.S.C. § 5520, the court of appeals misfocused on the issue of whether the County tax violates the Supremacy Clause.⁴ After concluding that a constitutional violation existed, the court of appeals disposed of the issue of Congressional consent by an unsupported construction of the Public Salary Tax Act, 4 U.S.C. § 111 (which subjects the pay of all federal officers to nondiscriminatory state and local taxation) and the Buck Act, 4 U.S.C. § 106-110 (which expressly subjects all federal officers including judges to county occupational tax) so as to carve out exceptions for federal judges. And, the court of appeals ignored 5 U.S.C. § 5520 (which implements the Buck Act and Public Salary Tax Act by establishing the withholding mechanism for the deduction of county occupational tax from the compensation of members of the federal judiciary) and a Presidential Executive Order at 31 C.F.R. § 215.2 (which expressly requires all members of the federal judiciary to cooperate in the withholding of county occupational tax). Moreover, the court of appeals refused to follow several decisions of

⁴ If Congress consented to the County tax it is irrelevant whether, in the absence of consent, the tax would be unconstitutional. The issue in this case is whether Congress consented.

this Court which establish the tests to determine whether a particular tax violates intergovernmental immunity or falls within the consent in the Buck Act and Public Salary Tax Act (i.e., the precise issue the court of appeals was considering).

The decisions of this Court which the court of appeals refused to follow.

In *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953) this Court examined a municipal tax which is indistinguishable from the instant County tax. The dispositive issue in *Howard* was the same as this case, whether the municipal tax violated the doctrine of intergovernmental tax immunity or fell within the consent of the Buck Act. This Court held that resolution of the question turned on whether the tax was an income tax under federal law. This Court applied the federal definition of the term "income tax" contained in the Buck Act⁵ and held that the Louisville tax was measured by gross receipts; therefore, it was an income tax for purposes of the Buck Act even though denominated a privilege license tax under Kentucky law. This Court held that it makes no difference how the tax is denominated under state law: "[t]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act. . . . We hold the tax

⁵ The term "income tax" is defined in the Buck Act, 4 U.S.C. § 110(c) as: "The term income tax means any tax levied on, with respect to or measured by net income, gross income or gross receipts."

authorized by this ordinance was an income tax within the meaning of federal law." 344 U.S. at 628-9.

In the instant case the court of appeals violated the spirit and rule of *Howard* by ignoring the federal definition of the term "income tax" and instead relied on Alabama's characterization of the County tax as a privilege license tax. The court of appeals' refusal to follow *Howard* is illustrated by the following sentence from its opinion: ". . . if the state court's denomination is a reasonable interpretation of the ordinance, we deem it conclusive." 92 F.3d at 1570. Thus, the court of appeals concluded that the County tax was not saved by the Buck Act because it was not an income tax under state law.

By applying state law, the court of appeals subverted the plain language of the Buck Act and ignored the test established by this Court in *Howard*. Moreover, the test used by the court of appeals was expressly rejected by this Court in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) and again in *United States v. New Mexico*, 455 U.S. 720 (1982).

In *United States v. New Mexico*, *supra*, this Court held:

. . . [i]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the federal government shoulders the entire burden of the levy.

* * *

. . . [t]ax immunity is appropriate in *only one circumstance*: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the

two cannot be realistically viewed as separate entities. . . .

455 U.S. 734, 735.

In *Graves v. New York, ex rel. O'Keefe, supra*, this Court held:

The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable.

306 U.S. at 480.

So much of the burden of a *non discriminatory general tax* upon the *incomes* of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the constitution presupposes, and hints it cannot rightly be deemed to be within an implied restriction of the taxing power of the national and state governments which the constitution has expressly granted to one and has to be confirmed to the other. *The immunity is not one to be implied from the constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the constitution has reserved to the state governments.*

306 U.S. at 487.

Ignoring the foregoing, the court of appeals ruled that a tax on the income of a federal judge is tantamount

to a direct tax on the United States. This conclusion is in direct conflict with *O'Keefe, supra*, which holds that the levy of an income tax on a federal employee does not violate tax immunity. The conclusion is puzzling given that the court of appeals paid lip service to *O'Keefe*⁶ but then refused to follow it. The holding is more puzzling because the evidence was undisputed and the trial court expressly found that the tax was paid by the judges out of their own funds and the tax imposed *no economic burden on the United States*. 850 F.Supp. at 1544. The court of appeals expressly stated: "[w]e hold that the legal incidence of the tax falls on the federal judge." 92 F.3d at 1571. How is it possible for the levy of an income tax on the private monies of a federal judge to be deemed to a violation of the tax immunity doctrine? According to this Court in *O'Keefe* it is not possible!

The court of appeals simply rejected the modern decisions of this Court and resurrected the old doctrine of intergovernmental tax immunity as it existed before the turn of the century. Now the law in the Eleventh Circuit is that federal judges are exempt from a state tax which is clearly an *income tax* as defined by *federal law* (i.e., the

⁶ "We accept that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge may be no more intimately connected with the federal government when receiving income than the federal employee in *O'Keefe*." 92 F.3d at 1571-72. "Therefore, this case is not controlled by *O'Keefe's* holding that income taxes do not interfere with federal functions in violation of the intergovernmental tax immunity doctrine." 92 F.3d at 1570.

Buck Act). That holding has far reaching and embarrassing consequences for the federal judiciary. First, under the Buck Act definition of the term "income tax" there is no way to distinguish between the county tax and the income taxes of Alabama and other states. They are all "income taxes" under the Buck Act. If the federal judges are really "the United States" and if the county tax on their income violates intergovernmental tax immunity, *so do the state income taxes!* Thus, the court of appeals effectively immunized the Article III judges⁷ in the Eleventh Circuit from all state taxes by holding that federal judges are the United States for purposes of evading taxes.

While exempting themselves from income taxation, the majority of the court of appeals apparently failed to consider that the dinosaur they were resurrecting also shields state and local employees from federal taxation. The doctrine is a two way street. Once resurrected it shields the employees of *both* sovereigns from taxation by the other. Thus, it follows from the court of appeals decision that state and municipal workers in the Eleventh Circuit are now immune from federal taxation!

The Acts of Congress and Presidential Executive Orders which the court of appeals ignored or re-wrote to carve out a judicial exception to Congressional consent to local taxation

When confronted with the obstacle of express Congressional consent to the levy of the county occupational

⁷ It is already being asserted that other federal employees in Jefferson County are similarly immunized from the County tax.

tax upon judicial pay, the trial court simply held the Buck Act and Public Salary Act unconstitutional as applied to federal judges. 850 F.Supp. at 1545, 46. The court of appeals affirmed but, apparently recognizing the recklessness of the trial court's conclusion, never actually held the Acts to be unconstitutional as applied to judges. Instead, a majority of the court of appeals accomplished the same result by rewriting the Acts to exempt themselves from coverage.

The Public Salary Act provides:

The United States consents to the taxation of *pay or compensation* for personal service as an officer or employee of the United States, a territorial possession or political subdivision thereof, the government of the District of Columbia, or an agency or *instrumentality* of one or more of the foregoing by a duly constituted taxing authority having jurisdiction, *if the taxation does not discriminate* against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111.

Nothing in the Act amounts to only a *partial waiver* of tax immunity. The Act does not distinguish between types of taxes. It does not exclude from its scope any occupational, privilege or license taxes. It is not limited to *some* federal officers or employees. The only limitation in the Act is that the tax be nondiscriminatory. Respondents never contended that the tax was discriminatory. The evidence before the court was undisputed that federal employees *and particularly federal judges* are treated in exactly the same manner as state and local employees and

private citizens.⁸ Therefore, the county tax satisfies the only test in the Public Salary Tax Act.

Yet, incredibly, the court of appeals held that Congress's consent in the Public Salary Tax Act to the "taxation of pay or compensation for personal service as an officer or employee of the United States" does not include the County's tax on the pay or compensation of a federal judge. 92 F.3d at 1574. The court of appeals cited no authority to back up its reading of the Public Salary Tax Act.⁹ *The court of appeals' holding in this case is the only reported opinion in the United States which holds that the Public Salary Tax Act does not apply to federal judges.* -

Having eviscerated the Public Salary Tax Act, the court of appeals turned to the Buck Act. The Buck Act provides:

No person shall be relieved from liability for any *income tax* levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area, or *receiving*

⁸ The evidence in this case is undisputed that the County tax is paid by all 27 state judges within Jefferson County, Alabama, and by three state Supreme Court justices who have satellite offices in the County. [R1-34-36]

⁹ The Court of Appeals holding in this case *directly conflicts* with the holding of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985). In that case the Third Circuit held that a municipal privilege license tax on the compensation of federal court reporters was within the scope of consent provided by the Public Salary Tax Act. And, the Third Circuit disregarded the fact that the Pennsylvania Supreme Court had declared that the municipal tax was a privilege tax rather than an income tax under state law.

income from transactions occurring or services performed in such area; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax within the federal area within such state to the same extent as though such area was not a federal area.

4 U.S.C. § 106(a).

As noted earlier in this petition, the term "income tax" is defined by the Buck Act as: "any tax levied on, with respect to or measured by, net income, gross income or gross receipts."¹⁰ 4 U.S.C. § 110(c). And, the term "federal area" is defined broadly in the Buck Act to encompass premises used by the United States for the purpose of operating a federal courthouse. 4 U.S.C. § 110(e).

Examination of the Senate Report on the Buck Act definition of the term "income tax" confirms that Congress deliberately chose a broad definition to include local privilege license taxes and occupational taxes:

[t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different state laws. The intent of your committee in laying down such a broad definition was to include therein any state tax (whether known as a corporate-franchise tax, or *business privilege tax*, or any other name) if it is levied on, with respect to or measured by net income, gross income, or gross receipts.

¹⁰ The Jefferson County occupational tax is measured by gross receipts.

* * *

The Buck Act "income tax", broadly defined as it is, refers to the broad, generic class of taxes upon income. *It does not require that the tax be denominated an income tax or that it conform to the federal income tax.* If the tax in question is based upon income, and is *measured by that income in money or monies worth*, if a net income tax, gross income tax or *gross receipts tax*, it is an "income tax".

Senate Report No. 1625, 76th Cong., 3rd Session (1940).

The provisions of the Buck Act and Public Salary Tax Act are implemented by 5 U.S.C. § 5520¹¹ and 31 C.F.R.

¹¹ 5 U.S.C. § 5520 providing:

- (a) When a county or city ordinance -
 - (1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sum to a designated city or county officer, department or instrumentality and
 - (2) imposes the duty of withholding generally on the payment of compensation earned within the jurisdiction of the city or county in the case of employees whose regular place of employment is within such jurisdiction.

The secretary of the treasury, under regulations prescribed by the President, shall enter into an agreement with the city or county within 120 days of a request for agreement by the proper city or county official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the city or county ordinance in the case of any employee of the *agency* who is subject to the tax and (i) whose regular place of federal employment is within the jurisdiction of the city or county with which the agreement is made or (ii) is a resident of such city or county.

§ 215.2¹² both of which expressly declare that the consent to taxation includes the salaries of federal judges.

Since (1) the county tax is an income tax under the Buck Act; and (2) this Court has held that an income tax on the income of a federal employee, however important the position, is not a tax on the United States or an

* * *

- (c) For the purpose of this section
 - (4) "Agency" means -
 - (a) An executive agency;
 - (b) The *judicial branch*; and
 - (c) The United States Postal Service.

¹² 31 CFR § 215.2:

- (a) "Agency" means each of the executive agencies and the military departments (as defined in 5 U.S.C. §§ 105 and 102 respectively) and the United States Postal Service and in addition for city or county withholding purposes only *all elements of the judicial branch.*

* * *

- (f) "County income or employment taxes" means *any form of tax* for which, under a county ordinance

- (1) Collection is provided by imposing on employers generally the duty of withholding sums from the pay of employees and making return of the sums to a designated county officer, department or instrumentality, and;
- (2) The duty to withhold generally is imposed on the payment of compensation earned within the jurisdiction of the County in the case of an employee whose regular place of employment is within such jurisdiction. *Whether the tax is described as an income tax, wage, payroll, earnings, occupational license or otherwise is immaterial.*

instrumentality thereof, *O'Keefe, supra*; and (3) the court of appeals conceded: " . . . a federal judge is not an instrumentality of the federal government when the activity being taxed is the receipt of income" 92 F.3d at 1571; it follows that the court of appeals could only conclude that Congress consented to the levy of this tax on these judges.

Instead, the court of appeals took the opportunity to elevate federal judges above all other federal employees by holding that they alone are outside the scope of the Congressional consent contained in the Public Salary Tax Act and Buck Act. Now, in Jefferson County, all governmental employees except federal judges pay the County tax. Now, in the Eleventh Circuit the Buck Act; Public Salary Tax Act; 5 U.S.C. § 5520; and, 31 C.F.R. § 215.2 mean the *opposite* of what they say. Now, in the Eleventh Circuit *Howard v. Commissioners of Sinking Fund of City of Louisville*; *Graves v. New York ex rel. O'Keefe*; and, *Arkansas v. Farm Credit Services* are not to be followed.

CONCLUSION

Congress consented to the levy of this tax on these judges. It is therefore irrelevant whether the County tax would, in the absence of such consent, violate the Supremacy Clause. The court of appeals' decision that federal judges are the United States and are therefore exempt from all state or local taxation is not supported by legal authority or by common sense. The decision resurrects notions of federal judicial immunity from the usual and ordinary cost of citizenship in this country that this Court and the U. S. Congress expressly rejected many years ago.

Removal of this case was improper under the federal officer removal statute because Respondents failed both elements of the test established by this Court in *Mesa v. California, supra* and because federal jurisdiction is barred by the TIA. Respondents are not federal instrumentalities and, pursuant to *Arkansas v. Farm Credit Services*, they are not entitled to the judicial exception to the TIA because the United States is not a party.

This case falls squarely within Supreme Court Rule 10(a) and (c). The decision of the Court of Appeals is in direct conflict with *Arkansas v. Farm Credit Services*; *Howard v. Commissioners of Sinking Fund of City of Louisville*; *Graves v. New York ex rel. O'Keefe*; the Third Circuit's decision in *United States v. City of Pittsburgh, supra*; and, the Ninth Circuit's decision in *Housing Authority of Seattle v. Washington Dep't of Revenue*, 629 F.2d 1307, 1311 (9th Cir. 1980).

The County urges this Court to grant this PETITION FOR WRIT OF CERTIORARI to the ELEVENTH CIRCUIT COURT OF APPEALS and either remand the case to state court for lack of federal jurisdiction or reverse the court of appeals' decision and render judgment in favor of the County on the merits.

Respectfully submitted,

EDWIN A. STRICKLAND

JEFFREY M. SEWELL

Counsel of Record

Jefferson County Attorney's Office
214 Jefferson County Courthouse
716 North 21st Street
Birmingham, AL 35263
(205) 325-5688

**JEFFERSON COUNTY, a political
subdivision of the State of Alabama,
Plaintiff-Appellant,**

v.

**William M. ACKER, JR.,
Defendant-Appellee.**

**JEFFERSON COUNTY, A political
subdivision of the State of Alabama,
Plaintiff-Appellant,**

v.

U.W. CLEMON, Defendant-Appellee.

No. 94-6400.

**United States Court of Appeals,
Eleventh Circuit.**

March 27, 1998.

**Appeal from the United States District Court for the
Northern District of Alabama.**

**Before HATCHETT, Chief Judge, TJOFLAT, ANDER-
SON, EDMONDSON, COX, BIRCH, DUBINA, BLACK,
CARNES and BARKETT, Circuit Judges,* and HENDER-
SON and KRAVITCH**, Senior Circuit Judges.**

COX, Circuit Judge:

*** Judges Frank M. Hull and Stanley Marcus became
members of the court after this case was argued and taken
under submission. They elected not to participate in this
decision.**

**** Senior U.S. Circuit Judges Henderson and Kravitch
elected to participate in this decision pursuant to 28 U.S.C.
§ 46(c).**

The issue presented by this case is whether Jefferson County, Alabama may require Article III judges to pay a tax for the privilege of engaging in their occupation within the county. In our earlier *en banc* opinion¹ we affirmed the district court's grant of summary judgment for the defendants, holding that the tax violates the Supremacy Clause of the Constitution. The Supreme Court vacated our judgment and remanded the case for reconsideration in light of its recent decision in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997), directing us to consider the effect of the Tax Injunction Act, 28 U.S.C. § 1341, on federal jurisdiction in this case. Upon reconsideration we hold that the district court had jurisdiction and reinstate our *en banc* opinion on the merits.

I. BACKGROUND²

Jefferson County Ordinance No. 1120 imposes a tax on persons not otherwise required to pay a license or privilege tax to the State of Alabama or Jefferson County. It states in pertinent part:

It shall be unlawful for any person to engage in or follow any vocation, [etc.], within the County . . . without paying license fees to the County for the privilege of engaging in or following

¹ *Jefferson County v. Acker*, 92 F.3d 1561 (11th Cir.1996) (*en banc*).

² As our consideration of the jurisdictional issue primarily concerns issues of law, we have summarized the facts briefly here; a more complete account appears in our earlier *en banc* opinion. See *Acker*, 92 F.3d at 1563-66.

such vocation, [etc.], which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance No. 1120, § 2 (Sept. 29, 1987). Defendants William M. Acker, Jr. and U.W. Clemon are United States District Judges for the Northern District of Alabama who maintain their principal offices in Birmingham, the Jefferson County seat. They refused to pay the privilege tax, contending that the tax as applied to federal judges violates the United States Constitution. Jefferson County subsequently sued them in state court to recover delinquent privilege taxes under the ordinance. The defendants removed the cases to federal court pursuant to 28 U.S.C. § 1442(a)(3); Jefferson County moved to remand, but the motion was denied. The cases subsequently were consolidated.

The district court granted summary judgment for the defendants, holding that the legal incidence of the tax fell not upon the judges but upon the federal judicial function itself, thus constituting a direct tax on the United States in violation of the intergovernmental tax immunity doctrine. See *Jefferson County v. Acker*, 850 F.Supp. 1536, 1545-46 (N.D.Ala.1994) (subsequent history omitted). The district court also held that as applied to federal judges the ordinance violated the Compensation Clause of Article III. See *id.* at 1547-58. Jefferson County appealed, and a panel of this court reversed. See *Jefferson County v. Acker*, 61 F.3d 848 (11th Cir.1995) (subsequent history omitted).

On rehearing *en banc*, this court affirmed the district court's ruling with respect to the intergovernmental tax immunity doctrine, stating that any holding with respect

to the Compensation Clause was unnecessary. See *Jefferson County v. Acker*, 92 F.3d 1561, 1576 (11th Cir.1996) (subsequent history omitted). With respect to the immunity issue, we concluded that although the privilege tax is measured by the income of the taxed individual, the taxable event is the performance of federal judicial duties in Jefferson County. See *id.* at 1572. As such, the privilege tax represents a fee that a federal judge must pay to lawfully perform his or her duties, and therefore a direct tax on the United States. See *id.* We further determined that Congress did not consent to such taxation; as the states may not levy a direct tax on the United States without Congress' consent, we held that the tax is unconstitutional as applied to the judges. See *id.* at 1573-76.

Jefferson County then filed in the Supreme Court a petition for a writ of certiorari. The Solicitor General submitted an *amicus* brief on behalf of Jefferson County, in which it argued that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, barred federal jurisdiction over the case. In a brief memorandum opinion, the Supreme Court vacated our *en banc* judgment and remanded the case for consideration of the TIA's effect on federal jurisdiction in light of the recent decision in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997). Jefferson County raised the jurisdictional issue in the district court in its unsuccessful motion to remand, but on appeal did not. Therefore, this is the first time that the issue has been raised in this court. We review jurisdictional rulings and other questions of law *de novo*. See, e.g., *McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir.1996).

II. DISCUSSION

A. Does the Federal Officer Removal Statute Apply?

The defendants removed this case to federal court under 28 U.S.C. § 1442(a)(3), the section of the federal officer removal statute applicable to federal court officers. Jefferson County contends that this case does not fall within the ambit of the statute, and that removal of the case to federal court was therefore improper.³ As no other circumstances exist that would support federal court jurisdiction, improper removal would mandate dismissal. Thus, our first inquiry is to determine whether § 1442 – applies.

Unlike the general removal statute (28 U.S.C. § 1441), § 1442 is a jurisdictional grant that empowers federal courts to hear cases involving federal officers where jurisdiction otherwise would not exist. See *Loftin v. Rush*, 767 F.2d 800, 804 (11th Cir.1985). It reads in pertinent part:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

³ In its brief Jefferson County characterizes this issue as determining whether § 1442 "restores" any federal jurisdiction otherwise denied by the TIA. See Supplemental *En Banc* Brief for Appellant at 17. However, as Article III courts have no jurisdiction except by statutory grant, see, e.g., *Baggett v. First Nat'l Bank*, 117 F.3d 1342, 1345 (11th Cir.1997), the proper inquiry for us is to determine first whether § 1442 provided the district court with any jurisdiction for the TIA to deny.

....

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

28 U.S.C.A. § 1442(a)(3) (1994 & Supp.1997). The judges are "officer[s] of the courts of the United States," but removal of an action under this section requires the satisfaction of two additional requirements: (1) the defendant must establish a "causal connection between what the officer has done under asserted official authority" and the action against him, *Maryland v. Soper*, 270 U.S. 9, 33, 46 S.Ct. 185, 190, 70 L.Ed. 449 (1926); and (2) the defendant must advance a "colorable defense arising out of [his] duty to enforce federal law," *Mesa v. California*, 489 U.S. 121, 133, 109 S.Ct. 959, 966-67, 103 L.Ed.2d 99 (1989); accord *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1427-28 (11th Cir.1996). Thus, under the statute federal officers facing state law claims against them arising out of their duties may remove their cases to federal court if they advance a colorable federal defense. See *Arizona v. Manypenny*, 451 U.S. 232, 241-42, 101 S.Ct. 1657, 1664, 68 L.Ed.2d 58 (1981). Jefferson County argues that the judges have not satisfied either requirement.

We agree with the district court that the plain language of § 1442 is sufficiently broad to encompass this case. The Jefferson County ordinance at issue makes it "unlawful for any person to engage in . . . any . . . occupation . . . without paying license fees to the County." Jefferson County, Ala., Ordinance No. 1120, § 2 (Sept. 29, 1987). Under official authority, Judges Acker and Clemon have "engaged in the occupation" of being United States District Judges "without paying license fees to the

County," and as a result the county has sued them. There is a direct causal connection between the judges' acts under official authority and the action against them.

As for the second requirement, Jefferson County in effect urges us to reconsider our decision on the merits, contending that the judges do not have immunity from the tax and therefore have not advanced a "colorable" defense for their refusal to pay. However, § 1442 does not require the resolution of, or even a detailed inquiry into, the merits of the federal defense advanced. One of the primary purposes of § 1442 is to allow officials to have the validity of their federal defenses determined in federal court. See *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969). For removal to be proper under § 1442, "[the federal defense alleged] need only be plausible; its ultimate validity is not to be determined at the time of removal." *Magnin*, 91 F.3d at 1427. At the time of removal the judges' immunity defense was at least "plausible," a conclusion supported by both the district court's grant of summary judgment for the judges and this court's subsequent affirmance. We hold that the federal officer removal statute is sufficiently broad to permit removal of this case.

B. Does the Tax Injunction Act Preclude Federal Jurisdiction?

The next issue to be resolved is the effect, if any, of the Tax Injunction Act (TIA) on federal jurisdiction in this case. Before the passage of the TIA, equity practice directed federal courts to abstain in cases involving state taxation out of concern for undue federal interference

with the States' internal economies. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447 (1932). The TIA represents a congressional recognition and sanction of this prior practice. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470, 96 S.Ct. 1634, 1640, 48 L.Ed.2d 96 (1976). It states:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341 (1994). Congress' purpose in enacting the TIA was "to deny jurisdiction to United States district courts to . . . restrain the assessment, levy, or collection" of state taxes. H.R.REP. NO. 75-1503 (1937) (House Judiciary Committee report recommending passage of TIA). As such, the TIA is not a guide to abstention, but a "jurisdictional rule," *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1779 (1997), stripping federal courts of the power to grant relief, *see United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 326 (5th Cir.1979) ("[T]he history of section 1341, from its precursor federal equity practice to its most current judicial construction, evidences that it is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems.").

1. Does the Language of the TIA Cover This Case?

The TIA only applies to situations involving a "tax under State law" and in which the state does not provide a "plain, speedy and efficient remedy." 28 U.S.C. § 1341

(1994). Neither party contends that the tax at issue is not a "tax under state law" within the meaning of the TIA, so we will assume *arguendo* that it is, an assumption consistent with the law in this circuit.⁴ As for the existence of a "plain, speedy and efficient remedy" in the Alabama courts, Jefferson County argues that the Alabama Declaratory Judgment Act, ALA.CODE § 6-6-220 (1997), and the judges' ability to assert their constitutional objections to the tax as affirmative defenses in their answer in a state court suit provide the necessary remedies. *See Supplemental En Banc Brief for Appellant* at 15-16. The defendants do not contest the issue,⁵ but in any event we agree with Jefferson County's argument on this point. *See Richards v. Jefferson County*, 789 F.Supp. 369, 371 (N.D.Ala.) (finding Alabama's remedies adequate for TIA purposes

⁴ Under our case law, the ordinance would seem to levy a "tax" rather than a regulatory "fee." *See Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 672 (holding that effect of similar "license fee" regulation was to raise general revenue, thus rendering it a "tax" for purposes of the TIA), *clarified*, 742 F.2d 590 (11th Cir.1984). While no court has explicitly held that local taxes constitute taxes "under State law," numerous decisions have applied the TIA to bar federal jurisdiction in cases involving local taxes. *See, e.g., Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981); *North Georgia Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429 (11th Cir.1993), *aff'd*, 989 F.2d 429 (11th Cir.1993); *United States v. Broward County*, 901 F.2d 1005 (11th Cir.1990); *Williams v. City of Dothan*, 818 F.2d 755, *modified*, 828 F.2d 13 (11th Cir.1987).

⁵ Most of the defendants' substantive arguments are contained in the brief filed by United States District Judges Hancock, Propst, Nelson and Blackburn as *amici curiae*, which the defendants adopt in its entirety. *See Supplemental En Banc Brief for Appellees* at 8.

in suit concerning same ordinance), *aff'd*, 983 F.2d 237 (11th Cir.1992). We hold that the case at bar falls within the scope of the TIA.

2. Does the TIA Bar Federal Jurisdiction?

Our holding that the TIA applies does not necessarily foreclose federal jurisdiction, as there are two exceptions to the literal proscriptions of the statute: First, as the TIA is a legislative enactment, Congress is of course free to create exceptions to the act in other legislation. Federal courts have found both express and implied congressional intent to create exceptions to the TIA in other jurisdictional statutes. See *City and County of San Francisco v. Assessment Appeals Bd.*, 122 F.3d 1274, 1276 (9th Cir.1997); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Johnson & Cravens, 13911, Inc.*, 858 F.2d 1010, 1015 (5th Cir.1988), *vacated on other grounds*, 889 F.2d 571 (5th Cir.1989); *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 529-30 (11th Cir.1983). Second, the statute "does not constrain the power of federal courts if the United States sues to protect itself or its instrumentalities from state taxation," *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1778, even if the case falls within the literal language of the statute. This judicially created "federal instrumentality" exception is based on the understanding that the sovereign is not bound by its own legislative restrictions unless it expressly intends to bind itself. See *id.* at ___, 117 S.Ct. at 1781. Thus, both exceptions involve a determination of congressional intent to allow federal jurisdiction notwithstanding the TIA's proscriptions. We examine them in turn.

a. Does § 1442 Override the TIA?

The defendants contend that § 1442, without more and in all cases, overrides the TIA, giving them an absolute right to remove to federal court. We reject this contention. As a statute that *strips* federal jurisdiction, the TIA assumes a preexisting statutory grant; without such a grant, there would be no jurisdiction for the TIA to strip away. The Supreme Court has spoken directly on this point:

Since presumably all actions properly within the jurisdiction of the United States district courts are authorized by one or another of the statutes conferring jurisdiction upon those courts, the mere fact that a jurisdictional statute . . . speaks in general terms of "all" enumerated civil actions does not itself signify that [an entity is] exempted from the provisions of [the TIA].

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 472, 96 S.Ct. 1634, 1641, 48 L.Ed.2d 96 (1976);⁶ see also *Bank of New England Old Colony v. Clark*, 986 F.2d 600, 603, 604 (1st Cir.1993) ("For the FDIC to prove that the [FIRREA] removal statute trumps the [TIA], it must show that Congress clearly and manifestly intended the statute to be an exception. . . . The mere fact that [the removal statute] states that the FDIC may remove 'all' actions does not in itself demonstrate the clear and manifest

⁶ Although it relied on the principle of comity underlying the TIA rather than the act itself, the Court came up with the same result with respect to tax refund actions under 42 U.S.C. § 1983. See *Fair Assessment in Real Estate Assoc. v. McNary*, 454 U.S. 100, 116, 102 S.Ct. 177, 186, 70 L.Ed.2d 271 (1981).

intent of Congress to trump the [TIA]. . . . Such language, rather, is consistent with a general grant of jurisdiction which did not take into account the provisions of the Act." (citations omitted)); *Ashton v. Cory*, 780 F.2d 816, 822 (9th Cir.1986) (ERISA § 502 (29 U.S.C. § 1132(e)(1)) is not exception to TIA, because "[i]n the absence of . . . express congressional action, we cannot infer that Congress intended impliedly to take the drastic step of carving out an exception to the Tax Injunction Act"). In light of the reasoning of the Supreme Court and of other federal courts, we reject the defendants' argument and hold that § 1442 standing alone is not a universal exception to the TIA.

b. *Do the Defendants Come Within The "Federal Instrumentality" Exception to the TIA?*

We have found no direct evidence of congressional intent to allow the defendants to bypass the TIA in the language of the statutes at issue. However, in *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966), the Supreme Court set forth a judicial exception to the TIA based on implied congressional intent, holding that "[the TIA] does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." The Court's holding was based on the understanding that the government is not bound by its own legislative restrictions unless it expressly intends to bind itself. See *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1781; see also *Dollar Sav. Bank v. United States*, 86 U.S. (19 Wall.) 227, 239, 22 L.Ed. 80 (1873). In other words, the

Court assumed that in enacting the TIA Congress did not intend to prevent the United States from asserting its own tax immunity in federal court. Thus the judicial exception, also known as the "federal instrumentality exception," allows the federal government to contest state taxation of its instrumentalities in federal court notwithstanding the restrictions of the TIA. See, e.g., *United States v. Broward County*, 901 F.2d 1005, 1008 (11th Cir.1990); *Dawson v. Childs*, 665 F.2d 705, 710 (5th Cir. Unit A Oct.1980); *United States v. Lewisburg Sch. Dist.*, 539 F.2d 301, 310 (3d Cir.1976).

1. *Arkansas v. Farm Credit Services*

Read literally, however, the exception articulated in *Department of Employment* only applies to "suits by the United States to protect itself and its instrumentalities" from state taxation. 385 U.S. at 358, 87 S.Ct. at 467 (emphasis added). The few circuit court cases addressing the issue are split on whether federal instrumentalities may contest state taxes in federal court without the government as a co-party. Compare, e.g., *FDIC v. City of New Iberia*, 921 F.2d 610, 613 (5th Cir.1991) (FDIC is federal instrumentality that may contest state tax in federal court without United States as co-plaintiff) with, e.g., *Housing Auth. of Seattle v. State of Washington, Dep't of Revenue*, 629 F.2d 1307, 1311 (9th Cir.1980) (joinder with the United States as co-plaintiff necessary for instrumentality to avoid TIA). This was the issue the Supreme Court set out to address in *Farm Credit Services*.

Farm Credit Services concerned Production Credit Associations (PCAs), federally chartered corporations

whose organic statute explicitly designates them as "instrumentalities" of the United States. See 12 U.S.C. §§ 2071(b)(7), 2077 (1994). PCAs are exempt by federal statute from state taxes on their "notes, debentures, and other obligations." See 12 U.S.C. § 2077 (1994). In *Farm Credit Services*, four PCAs sued the state of Arkansas in federal district court, claiming immunity not only from the taxes explicitly designated in § 2077, but from Arkansas sales and income taxes as well. The government did not participate in the suit, and the Solicitor General submitted an *amicus* brief opposing jurisdiction. Thus, the case turned on whether the PCAs could utilize the *Department of Employment* exception without the joinder of the government as a co-party. The Supreme Court held that the TIA barred the PCAs from contesting the tax in federal court unless the United States participated on their behalf. *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1780.

The Court has directed us to consider the jurisdictional issue in this case in light of *Farm Credit Services*. While the *Farm Credit Services* Court held that PCAs could not sue in federal court without the United States as co-party, it did not extend that holding to other instrumentalities; the result in *Farm Credit Services* seems to hold open the "federal instrumentality" exception for entities litigating on their own. Jefferson County's brief characterizes *Farm Credit Services* as holding that "federal courts [have] no jurisdiction over a dispute involving the collection of a state tax from a federal instrumentality unless the United States [is] a co-party." Supplemental *En Banc* Brief for Appellant at 16. This is a clear misreading of the opinion, which states only that "instrumentality

status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1782; see also *City and County of San Francisco v. Assessment Appeals Bd.*, 122 F.3d 1274, 1277 (9th Cir.1997) (interpreting *Farm Credit Services* as allowing some instrumentalities to bypass the TIA without the United States' participation). In fact, the *Farm Credit Services* Court reviewed different approaches used by the circuits and noted that a rule barring all federal instrumentalities from federal court unless the United States participates is the "most restrictive approach" of those used. *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1781.

With respect to the PCAs, the Court held that "[u]nder any of the tests . . . described, PCA's would not be exempt from [the TIA]." *Id.* at ___, 117 S.Ct. at 1782. The factor that seems to have weighed most heavily in the Court's decision is the PCAs' quasi-private status:

The PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal . . . designation as instrumentalities of the United States, . . . PCA's do not have or exercise power analogous to that of . . . any of the departments or regulatory agencies of the United States.

Id. Article III judges are completely dissimilar from PCAs. *Farm Credit Services* therefore informs our analysis, but does not answer the question before us with regard to Judges Acker and Clemon. However, the opinion cites

with seeming approval two cases which are helpful to our inquiry: *Moe v. Confederated Salish & Kootenai Tribes*,⁷ see *id.* at ___ U.S. at ___, 117 S.Ct. at 1781 ("Moe is instructive here."), and *Federal Reserve Bank v. Commissioner of Corps. and Taxation*,⁸ see *id.* at ___ U.S. at ___, 117 S.Ct. at 1782. We now examine those cases.

2. *Moe v. Confederated Salish & Kootenai Tribes*

In *Moe*, the Court affirmed a district court ruling that extended the United States' *Department of Employment* exception to Native American tribes suing in federal court. The district court allowed the tribes to bypass the TIA under the exception and enjoin the collection of state taxes from cigarette sales. It based this ruling on two alternative grounds: (1) that the United States' significant interest in the tribes qualified them for the exception, and a symbolic joinder of the United States would serve no purpose; and (2) that a separate jurisdictional statute, 28 U.S.C. § 1362,⁹ which gives Native Americans special access to federal court, embodied a congressional purpose to allow the tribes to sue in federal court as if they

⁷ 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

⁸ 499 F.2d 60 (1st Cir.1974).

⁹ The statute reads:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362 (1994).

were the United States. See *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1303-04 (D.Mont.1974).

The Supreme Court affirmed the ruling, but found each of the district court's grounds insufficient standing alone to justify allowing the tribes to bypass the TIA. The Court first stated that although the tribes' asserted interests coincided with those of the federal government, perhaps qualifying them for federal "instrumentality" status, this congruence of interests was insufficient by itself to exempt the tribes from the TIA. See *Moe*, 425 U.S. at 471-72, 96 S.Ct. at 1640-41. Likewise, the Court refused to interpret § 1362 as a blanket exception to the TIA. See *id.* at 472, 96 S.Ct. at 1641. ("[T]he mere fact that a jurisdictional statute such as § 1362 speaks in general terms of 'all' enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of [the TIA].").

Instead, the Court affirmed the district court on a hybrid of the two grounds. The Court assumed that the United States could have sued on behalf of the tribes by itself or as co-plaintiff, because of the congruence of the tribes' interests and those of the government. The Court also found that § 1362 evidenced a congressional intent to allow Native American tribes, in some circumstances, to participate in federal court as if they were the United States suing as the tribes' trustee. The Court held that under the circumstances of the case the tribes could use § 1362 to stand in the place of the United States and enjoy the benefit of the *Department of Employment* exception. See *id.* at 474-75, 96 S.Ct. 1641-42.

3. *Federal Reserve Bank v. Commissioner of Corps. & Taxation*

Federal Reserve Bank involved a declaratory judgment action brought in federal court by the Federal Reserve Bank of Boston, which sought to avoid Massachusetts sales tax on materials used to construct its new building. The First Circuit's decision allowed the bank to contest the tax in federal court without the United States as co-plaintiff. The court began by accepting the bank's status as a federal instrumentality, framing the case in terms of what it deemed the proper issue:

[T]he present case does not turn on whether federal reserve banks are instrumentalities. Plainly they are. The question is whether there is any reason to treat [the bank] differently from instrumentalities [not eligible for an exemption from the TIA] like savings and loan associations. . . . Is [the bank] privileged, like the United States itself, to maintain this proceeding?

Federal Reserve Bank, 499 F.2d at 62. The First Circuit noted that in answering the question of whether an entity could use the instrumentality exception without the participation of the government, "we must accept the absence of any bright line to facilitate analysis; each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation." *Id.* at 64.

The court decided that the bank was a federal instrumentality eligible for the *Department of Employment* exception, citing several factors in favor of its conclusion. First, the court noted that the bank performed significant governmental functions, serving primarily as a "fiscal arm[]

of the federal government," and thus a state tax affecting the bank would "call[] directly into question the sovereign interest of the United States." *Id.* at 62, 63. Second, the bank had the benefit of a special jurisdictional statute giving it access to the federal courts; the court stated that "[s]uch a clearly expressed strong federal interest in litigating all reserve bank business in the federal courts further tips the scale away from the general hostility to interfering with [state taxation]." *Id.* at 63. Third, the bank occupied a special place in the governmental structure "outside the executive chain of command," *id.*, which militated against forcing the bank to acquire the Attorney General's approval before going to court. Thus, the court concluded, the bank could "proceed in a federal forum under the same exception . . . available to the United States were it a named plaintiff." *Id.* at 64.

4. *Are the Judges Eligible for the Exception?*

We conclude that the defendants' situation more closely resembles that of the Native American tribes in *Moe* and the bank in *Federal Reserve Bank* than the PCAs in *Farm Credit Services*. The *Farm Credit Services* Court was concerned that PCAs are basically commercial lenders, whose interests "are not coterminous with those of the Government any more than most commercial interests." *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1782. In contrast, the *Federal Reserve Bank* court concluded that

[w]hile savings and loan associations may . . . be analogized to private corporations, federal reserve banks, . . . are plainly and predominantly fiscal arms of the federal government.

Their interests seem indistinguishable from those of the sovereign. . . .

Federal Reserve Bank, 499 F.2d at 62. Likewise, the *Moe* Court assumed that the Native American tribes at issue in that case had interests closely aligned with those of the United States, at least as far as taxation was concerned. See *Moe*, 425 U.S. at 471, 473-74, 96 S.Ct. at 1640, 1641-42.

As one of the three branches of the federal government, the federal judiciary's interests are congruent with, if not identical to, those of the United States. We held in our prior *en banc* opinion that "[w]hen performing federal judicial duties, a federal judge performs the functions of government itself, and cannot realistically be viewed as a separate entity from the federal court." *Acker*, 92 F.3d at 1572 (internal quotation and citation omitted). In interpreting the statute regarding the duties of the Attorney General, the Supreme Court rejected the argument that cases "in which the United States is interested" are solely those cases in which the interests of the executive branch are at stake. *United States v. Providence Journal Co.*, 485 U.S. 693, 701, 108 S.Ct. 1502, 1507-08 (1988). The Court stated: "It seems to be elementary . . . that the three branches are but co-ordinate parts of one government. . . . [W]e shall not assume that [Congress] intended . . . to exclude the judicial branch when it referred to the 'interest of the United States.'" *Id.* (internal quotation and citation omitted).

Another factor present in this case as well as in *Moe* and *Federal Reserve Bank*, but notably absent from *Farm Credit Services*, is the existence of a special jurisdictional

statute.¹⁰ Both *Moe* and *Federal Reserve Bank* concluded that special jurisdictional statutes, without more, were insufficient to override the TIA, but were evidence of congressional intent that the entities in question be allowed to stand in the place of the United States in federal court. While we have refused to read § 1442 as a blanket exemption to the TIA, we likewise find in the statute a congressional intent that federal officers' access to the federal courts "[will] be at least in some respects as broad as that of the United States." *Moe*, 425 U.S. at 473, 96 S.Ct. at 1641. As Congress recently noted, "[section 1442] fulfills Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." S.REP. NO. 104-366 at 31 (1996), reprinted in 1996 U.S.C.C.A.N. 4202, 4210. The United States can only act through its agents and officers; when those officers remove a case to federal court under § 1442 they are, in effect, appearing in court for the United States. The case

¹⁰ In interpreting *Farm Credit Services*, the Ninth Circuit has concluded that such a statute is a prerequisite for an entity wishing to utilize the federal instrumentality exception without the United States as a co-party. See *City & County of San Francisco v. Assessment Appeals Bd.*, 122 F.3d 1274, 1277 (9th Cir.1997) ("A federal instrumentality does not have to join the United States as a party, however, when a 'second federal statute grant[ing] sweeping federal court jurisdiction' exists.") (quoting *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1781). Other federal court decisions predating *Farm Credit Services* have held similarly. See *MRT Exploration Co. v. McNamara*, 731 F.2d 260, 265 (5th Cir.1984); *North Georgia Elec. Membership Corp. v. Calhoun*, 820 F.Supp. 1403, 1407-08 (N.D.Ga.1992), *aff'd*, 989 F.2d 429 (11th Cir.1993); *National Carriers' Conf. Comm. v. Heffernan*, 440 F.Supp. 1280, 1283 (D.Conn.1977).

before us directly implicates the congressional concerns addressed by § 1442, and "[s]uch a clearly expressed strong federal interest in litigating [such cases] in the federal courts further tips the scale away from the general hostility to interfering with a state taxing scheme." *Federal Reserve Bank*, 499 F.2d at 63.

Finally, important structural concerns militate against us requiring the defendants to acquire the support of the United States in this case. Much like the federal reserve banks, the federal judiciary operates "outside of the executive chain of command," *Id.* There are good reasons not to insist that the federal judiciary acquire the support of the Attorney General in order to assert Supremacy Clause immunity, not the least of which is the ever-present possibility of conflict between the executive and judicial branches. The federal instrumentality exception represents a judicial finding of Congress' implied intent in enacting the TIA; refusing to apply the exception in this case would be equivalent to a finding that Congress intended to put the judicial branch at the mercy of the executive.

Like the Native American tribes in *Moe* and the bank in *Federal Reserve Bank*, the defendants in this case have interests closely aligned with those of the United States, enjoy the benefits of a jurisdictional statute giving them special access to the federal courts, and occupy a place in the structure of our government that justifies allowing them to assert their tax immunity in federal court without first going hat-in-hand to the Attorney General. Having examined this case "in light of [the judges'] governmental role and the wishes of Congress as expressed in relevant legislation," *Federal Reserve Bank*, 499 F.2d at 64, we hold

that Judges Acker and Clemon are eligible for the *Department of Employment* exception, and therefore, that the district court had jurisdiction to hear the case.

III. CONCLUSION

We have reconsidered our decision in light of *Farm Credit Services*, and hold that under the facts of this case the defendants are eligible for the federal instrumentality exception. Therefore, the TIA does not operate to bar federal jurisdiction, and removal of the case was proper. Accordingly, we REINSTATE our *en banc* opinion on the merits and AFFIRM the district court's ruling.

AFFIRMED; EN BANC OPINION REINSTATED.

ANDERSON, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

Respectfully, I dissent for the reasons set out in my dissent, and Judge Birch's dissent, to the initial *en banc* decision. *Jefferson County v. Acker*, 92 F.3d 1561, 1576-81 (11th Cir.1996).

BIRCH, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

I respectfully dissent for the same reasons set out in the initial *en banc* decision. *Jefferson County v. Acker*, 92 F.3d 1561, 1577-81 (11th Cir.1996). Because I continue to view the tax at issue as nothing more than an income tax on the earnings of citizens who are also federal judges, I cannot agree that the federal instrumentality exception to the Tax Injunction Act applies. Accordingly, I believe the district court is without jurisdiction to hear this case.

CARNES, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

The Supreme Court vacated our prior decision and remanded this case to us "for further consideration in light of *Arkansas v. Farm Credit Services of Central Arkansas*, ___ U.S. ___, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997)," a decision which applied the Tax Injunction Act, 28 U.S.C. § 1341. When the Supreme Court vacates and remands one of our decisions, the entire case comes back to us and we are free to bring a fresh perspective (and hopefully fresh wisdom) to issues we have already addressed. See *Moore v. Zant*, 885 F.2d 1497, 1502-03 (11th Cir.1989) (en banc). Instead of reinstating our prior decision affirming the district court, we should seize this opportunity to correct our earlier decision.

When this case was last before us, I joined the majority opinion which held that insofar as Jefferson County's occupational tax applies to federal judges it amounts to a tax on federal instrumentalities and violates the intergovernmental tax immunity doctrine. Since then I have been convinced that I was wrong to join that holding. I would like to think that I have become smarter and more learned in the law since our prior decision was issued, but there is no compelling evidence to support such a conclusion as to any member of this Court. My change of view is attributable instead to reading the amicus brief filed by the United States after this case left our Court and while it was before the Supreme Court on a petition for writ of certiorari. Reading that brief (which was incorporated as an appendix into the latest brief Jefferson County filed in this Court) and reflecting upon it, as well

as re-reading some of the authorities cited has convinced me that I was wrong before.

Having finally seen the light, I join Judges Anderson, Birch, and Henderson in concluding that the occupational tax at issue in this case is a tax upon the "pay or compensation" of those to whom it applies, including federal judges. As such it falls within the consent to taxation Congress has given in the Public Salary Act, 4 U.S.C. § 111, and therefore does not violate the intergovernmental tax immunity doctrine. Application of the tax to federal judges is not unconstitutional.

As for the *Farm Credit Services* issue, I do not believe that the federal instrumentality exception to the Tax Injunction Act applies in this case. Accordingly, I would hold that the district court lacked jurisdiction, and I would vacate its judgment and remand with directions to dismiss the case for lack of jurisdiction. Assuming to the contrary that the Tax Injunction Act does not bar this action, I would reverse and remand the district court's judgment on the merits.

**JEFFERSON COUNTY, a political sub-
division of the State of Alabama,
Plaintiff-Appellant,**

v.

**William M. ACKER, Jr.,
Defendant-Appellee.**

**JEFFERSON COUNTY, a political sub-
division of the State of Alabama,
Plaintiff-Appellant,**

v.

U.W. CLEMON, Defendant-Appellee.

No. 94-6400.

**United States Court of Appeals,
Eleventh Circuit.**

Aug. 30, 1996.

County brought action against federal judges to recover delinquent privilege taxes. Judges removed case to federal court. The United States District Court for the Northern District of Alabama, Nos. CV93-M-69-S and CV93-M-196-S, Charles A. Moye, Jr., J., granted summary judgment to judges, 850 F.Supp. 1536, and county appealed. The Court of Appeals reversed, 61 F.3d 848. Rehearing en banc was granted. The Court of Appeals, Cox, Circuit Judge, held that: (1) privilege tax violated intergovernmental tax immunity doctrine, and (2) Congress did not consent to tax.

Affirmed.

Anderson, Circuit Judge, filed dissenting opinion, in which Henderson, Senior Circuit Judge, joined.

Birch, Circuit Judge, filed dissenting opinion, in which Henderson, Senior Circuit Judge, joined.

Appeals from the United States District Court for the Northern District of Alabama.

Before TJOFAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges, and HENDERSON*, Senior Circuit Judge.

COX, Circuit Judge:

We decide in this case whether Jefferson County, Alabama, may impose on federal judges holding office under Article III of the Constitution¹ a tax for the privilege of engaging in their occupation within the county. We hold that such a tax violates the Supremacy Clause of the Constitution.²

* Senior U.S. Circuit Judge Henderson elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

¹ Article III of the Constitution vests the judicial power of the United States in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Article III judges include federal district court judges, judges for the circuit courts of appeals, and justices of the Supreme Court.

² Given the nature of the question presented in this case, we considered the issue of recusal at the outset. Our discussion of the recusal issue is included as an appendix.

I. FACTS AND PROCEDURAL HISTORY

Jefferson County, Alabama, sued William M. Acker, Jr., and U.W. Clemon, United States District Judges for the Northern District of Alabama, to recover delinquent county taxes due under Jefferson County Ordinance No. 1120. Ordinance No. 1120 imposes a license or privilege tax (the "privilege tax") on persons not otherwise required to pay any license or privilege tax to the State of Alabama or Jefferson County. The ordinance provides:

It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the County on or after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent ($1/2$ %) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance No. 1120, § 2 (Sept. 29, 1987).

The ordinance defines "vocation, occupation, calling and profession" to include the holding of any kind of office, by election or appointment, by any federal, state, county, or city officer or employee where the officer's or employee's services are rendered within Jefferson County. *Id.* § 1(C).³ It is undisputed that the ordinance

³ The ordinance also includes the following definition of "vocation, occupation, calling and profession":

The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal

facially applies to federal judges. Non-residents of Jefferson County performing work in Jefferson County must pay the privilege tax. See *Id.* § 1(B). The ordinance defines "gross receipts," by which it measures the privilege tax, as the total gross amount of all salaries, wages, or other monetary payments of any kind which a person receives or is entitled to receive for work or services. *Id.* § 1(F).⁴ If

services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following [listing sections of the Code of Alabama].

Ordinance No. 1120, § 1(B).

⁴ Ordinance No. 1120, § 1(F) provides:

The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by

compensation is earned from work both inside and outside Jefferson County, the privilege tax is based on the proportion of work performed within Jefferson County. *Id.* § 3. The computation of the percentage of work done within Jefferson County must be supported by oath. *Id.*

The ordinance requires employers to withhold privilege taxes, to file returns with the Director of Revenue, and to keep and maintain certain records for five years. *Id.* § 4. The Administrative Office of the United States Courts has never withheld Jefferson County privilege taxes from the salary of any federal judge or court employee. Under the ordinance, an employer's failure to withhold the privilege tax does not relieve employees from the obligation to pay. *Id.* An employee whose employer has failed to comply with the ordinance must file a return and pay the privilege tax. *Id.* § 5.

The ordinance grants certain investigative powers to the Jefferson County Director of Revenue. These include the power to examine the books, records, and papers of any employer or licensee to determine the accuracy of any return or to determine the amount of privilege taxes due if no return was filed, as well as the power to examine any person under oath concerning any gross receipts which were or should have been shown in a return. *Id.* § 7. The Director of Revenue also may promulgate regulations for the administration and enforcement of the ordinance. *Id.* § 8.

his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received . . .

The ordinance imposes interest and penalties for the failure to pay privilege taxes and the failure to withhold privilege taxes. *Id.* § 10(A). In addition, the ordinance alludes to other punishment for failing to comply with its requirements:

Any person or employee who shall fail, neglect or refuse to pay a license fee . . . or any employer who shall fail to withhold said license fees, or to pay over to County such license fees . . . , or any person required to file a return . . . who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him . . . to examine his books, records and papers for any purpose authorized by this Ordinance . . . shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Id. § 10(B). Alabama law provides that each violation⁵ of a city or town ordinance requiring the payment of privilege taxes is punishable by a fine, as prescribed by the ordinance, of up to \$500, by up to six months imprisonment, or by both. Alabama Code § 11-51-93 (1989). Alabama law does not appear to provide criminal sanctions for violating county ordinances requiring the payment of privilege taxes.

⁵ Each day one works without a license constitutes a separate offense. Alabama Code § 11-51-93 (1989).

At least three other local governments in Alabama have ordinances requiring the payment of license or privilege taxes. The Cities of Gadsden and Birmingham, in the Northern District of Alabama,⁶ and Auburn, in the Middle District of Alabama, have ordinances almost identical to Jefferson County's, though their ordinances tax gross receipts at a higher rate and, because they are city ordinances, are backed by criminal penalties under Alabama law. See *Id.* Counsel for Jefferson County told us at oral argument that Jefferson County simply copied Birmingham's ordinance when enacting Ordinance No. 1120.

Judge Acker and Judge Clemon maintain their principal offices in the Hugo Black Federal Courthouse in Birmingham, Alabama, which lies within Jefferson County. They routinely perform some but not all of their duties outside of Jefferson County. Judges Acker and Clemon have refused to pay the privilege tax imposed by the ordinance. Before the district court's opinion in this case, all other active judges of the Northern District of Alabama paid the privilege tax on differing percentages of their judicial salaries without supporting those percentages by an oath or any formal accounting procedure. In addition, all state judges with offices in Jefferson County have paid the privilege tax based on portions of their salaries.

Jefferson County sued Judge Acker and Judge Clemon in state court to recover delinquent privilege taxes due under the ordinance. Each judge removed his

⁶ The Northern District of Alabama holds court in both Birmingham and Gadsden. 28 U.S.C. § 81 (a)(3) and (6).

case to federal court, where the cases were consolidated. The parties stipulated to the facts and submitted cross-motions for summary judgment.

The district court⁷ held that, under the intergovernmental tax immunity doctrine, the ordinance is unconstitutional as applied to Judge Acker and Judge Clemon. The court concluded that the legal incidence of the privilege tax falls on the federal judicial function. *Jefferson County v. Acker*, 850 F.Supp. 1536, 1543 (N.D.Ala.1994). According to the court, the privilege tax, "by express intention and in real effect, is a franchise tax imposed upon the federal judicial operations and is unconstitutional as a direct tax upon an officer and instrumentality of the United States, that is, upon the sovereign itself." *Id.* at 1545-46.

The district court also held that applying the ordinance to Judges Acker and Clemon violates the Compensation Clause of Article III.⁸ *Id.* at 1547. The privilege tax diminishes a judge's compensation, rather than taxing his salary, the court held, because its incidence "is upon the performance of judicial functions by a judicial officer, antecedent to the point that the salary therefor having been paid by the government becomes the property of the

⁷ The Honorable Charles A. Moye, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

⁸ The Compensation Clause provides that Article III judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

individual citizen of Alabama." *Id.* at 1547-48. Jefferson County appealed.⁹

A panel of this court reversed, holding that the ordinance may be applied to Article III judges without violating the intergovernmental tax immunity doctrine or the Compensation Clause. *Jefferson County v. Acker*, 61 F.3d 848 (11th Cir.1995). Chief Judge Tjoflat dissented. The panel majority disagreed with the district court's conclusion that the ordinance taxes the federal judicial function. The panel majority determined that "the practical effect of [the ordinance] is to tax the income that federal judges derive from the performance of their judicial functions," not "to impose a license tax as a precondition to the performance of those functions." *Id.* at 855. And the panel majority determined that federal judges are federal officers rather than arms of the federal government. *Id.* at 853. Therefore, the panel held, the ordinance does not directly tax the operations of the federal government in violation of the intergovernmental tax immunity doctrine. *Id.* at 856.

Also based on its determination that the practical effect of the privilege tax is that of an income tax, the panel majority held that the Compensation Clause does not bar applying the ordinance to federal judges. *Id.* According to the panel majority, "[i]t is well established

⁹ The district court also held that the ordinance does not discriminate against Judges Acker and Clemon by reason of the federal source of their compensation in violation of the Public Salary Act, 4 U.S.C. § 111. On this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it.

that the Compensation Clause does not forbid . . . levying an income tax on federal judges." *Id.* (citing *O'Malley v. Woodrough*, 307 U.S. 277, 282, 59 S.Ct. 838, 840, 83 L.Ed. 1289 (1939)).

Judges Acker and Clemon filed a suggestion for rehearing en banc. Recognizing this case to involve legal questions and principles of exceptional importance, we granted rehearing en banc to determine whether the ordinance constitutionally may be applied to Article III judges.

II. ISSUES ON APPEAL

Two issues have been raised on appeal: (1) whether the tax imposed by Ordinance No. 1120 constitutes an unconstitutional diminution in the compensation of Article III judges; and (2) whether the tax imposed by Ordinance No. 1120 violates the Supremacy Clause as an intergovernmental tax. Because we hold that the Supremacy Clause bars the application of the ordinance to federal judges, we do not address whether the ordinance unconstitutionally diminishes federal judges' compensation.

III. CONTENTIONS OF THE PARTIES

Jefferson County contends that the district court erred in holding that the intergovernmental tax immunity doctrine prohibits imposing the privilege tax on federal judges. Jefferson County argues that the Public Salary Act and the Buck Act waived the tax immunity of federal officers, including federal judges, with respect to all taxes

except discriminatory taxes. Because the privilege tax is not discriminatory, the County argues, it constitutionally may be applied to federal judges.

The County further contends that, even if Congress's waiver of federal tax immunity does not apply to the privilege tax, the intergovernmental tax immunity doctrine bars only those state taxes levied directly on the federal government itself.¹⁰ The privilege tax, the County argues, is not levied directly on the federal government. Rather, it is imposed on individuals, who are employees of the federal government as opposed to its agencies or instrumentalities. The County argues that Judges Acker and Clemon have conceded their tax immunity argument by admitting that they are subject to the Alabama state income tax: if they were instrumentalities of the federal government, tax immunity would shield them not only from the privilege tax but also from state income taxes.

Judges Acker and Clemon contend that Congress has not waived their federal tax immunity from the privilege tax. They argue that the privilege tax violates the intergovernmental tax immunity doctrine because the legal incidence of the privilege tax is not on the individual judge but on the performance of the federal judicial function. The judges contend that a federal judge is the federal court when performing judicial duties. The judges

¹⁰ The County recognizes that the intergovernmental tax immunity doctrine also bars taxes that discriminate against the federal government. But the dispute on this appeal does not center on whether the privilege tax is discriminatory and, in light of our disposition of the case, we do not address whether the privilege tax is discriminatory.

contend that state law is determinative of the legal incidence of the privilege tax. When state law demonstrates that a tax is levied on a federal function, they argue, the practical effect of the tax need not be considered. Judges Acker and Clemon also argue that the ordinance's onerous time-keeping and return requirements burden the federal judicial function.

IV. DISCUSSION

We are presented with an issue of first impression. The parties have not cited, and we have not found, any federal case addressing whether the intergovernmental tax immunity doctrine prohibits a state or local government from imposing a privilege tax on Article III judges.

We begin our analysis with an examination of the contours of the intergovernmental tax immunity doctrine, mindful that the nature of the tax and the identity of the taxpayer here differ significantly from the taxes and taxpayers at issue in previous intergovernmental tax immunity cases. Then we apply the doctrine to the judges' challenge to the Jefferson County privilege tax. Finally, we determine whether the Public Salary Act and the Buck Act have altered the intergovernmental tax immunity doctrine's limits on state and local taxation so as to permit the imposition of the privilege tax on federal judges.

A. *The Intergovernmental Tax Immunity Doctrine*

The purpose of the intergovernmental tax immunity doctrine is to forestall "clashing sovereignty." *United*

States v. New Mexico, 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580 (1982) (quoting *McCulloch v. Maryland*, 4 Wheat 316, 430, 4 L.Ed. 579 (1819)). Born of Chief Justice Marshall's opinion in *McCulloch v. Maryland*, and aphoristically expressed in Marshall's famous dictum "the power to tax involves the power to destroy," the intergovernmental tax immunity doctrine seeks to reconcile states' sovereign taxing authority with the Supremacy Clause's protection of federal operations from state interference. See generally *New Mexico*, 455 U.S. at 730-36, 102 S.Ct. at 1380-1383; Paul J. Hartman, *Federal Limitations on State and Local Taxation* §§ 6:1-6:15 (1981). The Supreme Court's attempt to fashion a doctrine accommodating these competing constitutional imperatives "has been marked from the beginning by inconsistent decisions and increasingly delicate distinctions." *New Mexico*, 455 U.S. at 730, 102 S.Ct. at 1380-81.

For over a century, the Supreme Court treated Marshall's famous dictum as a constitutional mandate, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 489, 59 S.Ct. 595, 602, 83 L.Ed. 927 (1939) (Frankfurter, J., concurring), finding in case after case that nondiscriminatory state taxes potentially affecting the federal government – even taxes imposed on private parties dealing with the government – threatened to disrupt federal operations. The Court thus struck down, for example, state income taxes on federal employees, *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435, 10 L.Ed. 1022 (1842), and state sales taxes on private companies' sales to the federal government, *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928). The theory was that

such taxes might increase the cost to the federal government of performing its functions. *United States v. County of Fresno*, 429 U.S. 452, 460, 97 S.Ct. 699, 703, 50 L.Ed.2d 683 (1977).

The theory that a nondiscriminatory tax unconstitutionally interferes with federal functions simply because it imposes an economic burden on the federal government was abandoned in *James v. Dravo Contracting*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937). There, the Court assumed that a state gross receipts tax levied on a federal contractor increased the cost to the government of the contractor's services, but held that the tax nevertheless did not interfere in any substantial way with the performance of federal functions. *Id.* at 160, 58 S.Ct. at 221. Dravo signalled the beginning of the end of constitutional tax immunity for private parties dealing with the federal government. Thus, two years later the Court overruled *Dobbins*, which had immunized federal employees from state income taxes, declaring that any economic burden on the government from an income tax on a government employee is "but the normal incident of the organization within the same territory of two governments, each possessing the taxing power," and a burden "which the Constitution presupposes." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 487, 59 S.Ct. 595, 601, 83 L.Ed. 927 (1939) ("O'Keefe").

The *O'Keefe* Court focused its analysis on whether an income tax on a federal employee obstructs or interferes with the performance of federal functions. *Id.* at 477, 481, 484, 59 S.Ct. at 597, 599, 600. Earlier cases granting immunity from income taxes, the Court said, failed to consider

whether such taxes interfered with government functions; they just assumed that the immunity of the government and its instrumentalities extended to employees of those entities. *Id.* at 481, 59 S.Ct. at 599. But "[t]he theory . . . that a tax on income is legally or economically a tax on its source [was] no longer tenable" after *Dravo*. *Id.* at 480, 59 S.Ct. at 598. Thus not willing to assume any burden on government functions, *Id.* at 486, 59 S.Ct. at 601, the court examined whether an income tax indeed interfered with government functions. The Court found no burden on federal functions other than the economic burden that may be passed on to the government in the form of higher labor costs. *Id.* at 481, 59 S.Ct. at 598. Concluding that such a burden does not amount to an interference with the performance of federal functions, the Court upheld the imposition of state income taxes on federal employees. *Id.* at 487, 59 S.Ct. at 601.

Later cases similarly recognized that the economic burden on the federal government of nondiscriminatory state taxes imposed on those dealing with the federal government generally does not threaten to impede the performance of federal functions. *E.g.*, *South Carolina v. Baker*, 485 U.S. 505, 521, 108 S.Ct. 1355, 1366, 99 L.Ed.2d 592 (1988) (noting that tax's entire financial burden may fall on government without rendering tax unconstitutional); *New Mexico*, 455 U.S. at 734, 102 S.Ct. at 1382 (noting that no immunity arises from federal government shouldering tax's entire economic burden); *County of Fresno*, 429 U.S. at 462, 97 S.Ct. at 704-705 (noting that economic burden on federal function does not render tax unconstitutional). With this recognition, the intergovernmental tax immunity doctrine has become somewhat

more attuned to the practical realities of our federal system. But the test for determining whether a non-discriminatory tax interferes with the federal government's functions remains highly formalistic.

Current intergovernmental tax immunity doctrine asks whether the "legal incidence," as opposed to the economic burden, of the tax falls directly on the federal government or its instrumentality. See *New Mexico*, 455 U.S. at 735, 102 S.Ct. at 1383; *County of Fresno*, 429 U.S. at 464, 97 S.Ct. at 705. A nondiscriminatory state or local tax is unconstitutional only "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *New Mexico*, 455 U.S. at 735, 102 S.Ct. at 1383. To be an instrumentality of the government, a taxed entity must be "so intimately connected with the exercise of a power or the performance of a duty by the Government that taxation of it would be a direct interference with the functions of government itself." *Id.* (citations and internal quotation marks omitted).

The "legal incidence" test has significantly constricted federal intergovernmental tax immunity. Indeed, the Supreme Court has characterized the current doctrine's prohibition against taxes legally incident on the federal government or its instrumentalities as of "essentially symbolic importance, as the visible 'consequence of that [federal] supremacy which the constitution has declared.'" *New Mexico*, 455 U.S. at 735, 102 S.Ct. at 1383 (quoting *McCulloch v. Maryland*, 4 Wheat. at 436). Relegation of the doctrine to largely symbolic importance is not

surprising in light of the recognition that the economic burden of nondiscriminatory state taxes does not threaten the government's operations. After all, by its very essence, a tax imposes an economic burden. If the Constitution presupposes such an economic burden, then few taxes will violate the intergovernmental tax immunity doctrine.

We do not mean to gainsay the intergovernmental tax immunity doctrine's importance in our federal system. Though it has been narrowed and beset by formalism, the doctrine has continuing vitality. Our point is that the reason for the doctrine's contraction must be appreciated to understand the scope of the doctrine's continuing vitality. The doctrine's contraction stemmed not from a weakening of the principle that, under the Supremacy Clause, states may not burden or interfere with federal operations, but from the recognition that nondiscriminatory taxes levied on private parties generally do not impede federal operations. The intergovernmental tax immunity doctrine still prohibits any state or local tax that burdens or interferes with federal operations.

Mindful of the underlying purpose of intergovernmental tax immunity, the doctrine's history, and the "actual workings of our federalism," *O'Keefe*, 306 U.S. at 490, 59 S.Ct. at 603 (Frankfurter, J., concurring), we turn to whether the Jefferson County privilege tax constitutionally may be levied on Judges Acker and Clemon.

B. *The Federal Judges' Challenge to the Privilege Tax*

Judge Acker and Judge Clemon's challenge to the privilege tax differs substantially from most intergovernmental tax immunity challenges. As far as we can tell, Judges Acker and Clemon are the first federal judges to challenge a state or local tax on intergovernmental tax immunity grounds. Moreover, because the privilege tax differs from most taxes, their objection to the privilege tax is novel. They do not allege that the privilege tax interferes with federal functions by imposing an economic burden on the federal government. The district court found that the privilege tax imposes no economic burden on the federal government itself; it is paid by individual federal judges out of their own pockets. Judges Acker and Clemon do not question this conclusion and, thus, do not make the economic-burden argument that now has been thoroughly repudiated by the intergovernmental tax immunity doctrine.¹¹

The burden of which Judges Acker and Clemon complain is the ordinance's requirement that they remit privilege taxes for the privilege of lawfully performing federal judicial duties in Jefferson County. Though they object to paying a tax, they do so not for the economic reasons generally associated with objections to taxes but because the tax purports to be a precondition to the lawful performance of their federal judicial duties.

¹¹ Purporting to eschew the economic-burden theory, some litigants have couched their arguments simply in terms of interfering with federal functions, but these challenges invariably have amounted to challenges to the tax's economic burden.

Jefferson County contends that the privilege tax does not regulate, control, or license a federal judge's performance of his duties any more than a state income tax. If Jefferson County is correct that, despite being labelled a "license fee," the privilege tax amounts to an income tax, then it constitutionally may be applied to Judges Acker and Clemon under *O'Keefe*. Thus, before attempting to ascertain the "legal incidence" of the privilege tax under the intergovernmental tax immunity doctrine, we examine the substantive nature of the privilege tax to determine whether it merely taxes the receipt of income.

1. *Whether the Privilege Tax Is In Substance An Income Tax*

To determine the nature and effect of the privilege tax, "we must look through form and behind labels to substance." *City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 492, 78 S.Ct. 458, 460, 2 L.Ed.2d 441 (1958). We are the ultimate arbiters of the substance of the privilege tax. But state law defines the attributes comprising the substance of the privilege tax.

The Alabama Supreme Court has described the operational effect of a City of Auburn ordinance identical to the Jefferson County ordinance in all relevant respects. *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972). Rejecting the argument that the Auburn ordinance imposed an income tax not authorized by the state constitution, Alabama's highest court explained that

[t]he tax is occasioned when the taxpayer performs services within the Auburn city limits, and not when the taxpayer receives income.

Therefore, the ordinance taxes the privilege of working and the engagement of rendering services within the City of Auburn, and it only measures the tax due by the amount of the taxpayers' gross receipts which result from such privilege. . . . It is evident that the tax is not even measured by a person's income, but only by his salary or wages earned. So in no sense can the Auburn tax be considered an income tax.

Id. at 837.

Concerned with substance, not labels, we pay no heed to the state court's conclusion that the privilege tax is not an "income tax" under state law. In analyzing the privilege tax's natural effect, however, we accord great weight to the state court's determination of how the tax operates; if the state court's determination is a reasonable interpretation of the ordinance, we deem it conclusive. See *Gurley v. Rhoden*, 421 U.S. 200, 208, 95 S.Ct. 1605, 1610, 44 L.Ed.2d 110 (1975) (deferring to state court's reasonable determination of operating incidence of excise tax).

The Alabama Supreme Court's determination of the operation of the Auburn ordinance is a reasonable interpretation of how the identical Jefferson County ordinance operates. Our examination of the Jefferson County ordinance, within the context of Alabama law, reveals that the privilege tax is a tax on the performance of work in Jefferson County. In substance, the privilege tax does not tax the receipt of income.

The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful

to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Other provisions of the ordinance further demonstrate that the privilege tax does not merely tax the receipt of income. The privilege tax is levied not only on income received but also on income that one is entitled to receive, *id.* § 1(F), indicating that the ordinance is concerned with ensuring that work is taxed regardless of whether income from the work actually is received. Moreover, persons engaged in occupations or businesses for which they are required to pay state or other Jefferson County license fees are exempted from paying the privilege tax under Ordinance No. 1120. *Id.* § 1(B). We do not understand why, if the ordinance is an income tax, it exempts from its requirements persons paying license fees to Jefferson County or to the State of Alabama, license fees that are totally unrelated to income.¹² This exemption makes sense only if the ordinance aims to ensure that a license fee is paid to some unit of government for all work performed in Jefferson County.

We hold that the Jefferson County privilege tax is not, in substance, a tax on income. Though the privilege tax is measured by income, at least roughly, its other attributes remove it from any reasonable conception of an income tax. Therefore, this case is not controlled by

¹² Attorneys, for example, must pay a flat annual license fee of \$250 to the state, regardless of their income. Ala.Code § 40-12-49.

O'Keefe's holding that income taxes do not interfere with federal functions in violation of the intergovernmental tax immunity doctrine.

2. The Legal Incidence of the Privilege Tax

Our determination that the privilege tax does not tax the receipt of income is only the beginning of our inquiry. Regardless of what "type" of tax the privilege tax is, the intergovernmental tax immunity doctrine bars its imposition on Judges Acker and Clemon only if its legal incidence falls directly on the federal government or its instrumentality. *New Mexico*, 455 U.S. at 735, 102 S.Ct. at 1383. Judges Acker and Clemon urge that the privilege tax falls on the federal judicial function, as the district court held. Jefferson County contends that the privilege tax is imposed on individuals, not on the federal government or the federal judicial function.

Identifying the legal incidence of the privilege tax is a question of federal law. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121, 74 S.Ct. 403, 410, 98 L.Ed. 546 (1954). However, as with our determination of the nature of the privilege tax, determining the privilege tax's legal incidence requires us to identify the substantive characteristics of the privilege tax under state law. *City of Detroit*, 355 U.S. at 493, 78 S.Ct. at 460-61. Then, we must evaluate the substance of the privilege tax under the federal standards for identifying a tax's legal incidence. *Kern-Limerick*, 347 U.S. at 121, 74 S.Ct. at 410.

We hold that the legal incidence of the tax falls on the federal judge. As the Supreme Court seems to apply the

legal incidence test, the legal incidence of a tax falls on the *entity* that the taxing statute identifies as the taxpayer and contemplates paying the tax. See *United States v. State Tax Commission of Mississippi*, 421 U.S. 599, 607-610, 95 S.Ct. 1872, 1877-79, 44 L.Ed.2d 404 (1975); *Gurley*, 421 U.S. at 203-212, 95 S.Ct. at 1608-12; *Kern-Limerick*, 347 U.S. at 113-123, 74 S.Ct. at 406-411. The ordinance identifies the person engaging in work in Jefferson County as the taxpayer and contemplates that he or she will pay the tax.¹³ Ordinance No. 1120, §§ 2, 4, 5. Thus, the legal incidence of the privilege tax falls on Judge Acker and Judge Clemon.

3. *Whether Federal Judges Are Federal Instrumentalities*

We must determine, then, whether Judges Acker and Clemon may be considered the federal government or its instrumentalities. The district court concluded that federal judges are federal instrumentalities. Judges Acker and Clemon argue that a federal judge is the federal court when performing judicial duties. Jefferson County argues that Judges Acker and Clemon are individuals and employees of the federal government, not its instrumentalities. According to the County, Judges Acker and Clemon cannot be instrumentalities of the government because, if they were, then they would be immune from state income taxes as well.

¹³ The ordinance imposes withholding requirements on employers, but contemplates that the license fee will be paid by the person engaging in the work.

Judges Acker and Clemon may be instrumentalities of the federal government with respect to the taxation of one activity but not another. See *New Mexico*, 455 U.S. at 740-743, 102 S.Ct. at 1386-87 (suggesting that an entity may be a federal instrumentality when one activity is taxed even if it is not an instrumentality when another activity is taxed). The Supreme Court's description of what constitutes a federal instrumentality suggests that the activity being taxed may determine whether the taxpayer is a federal instrumentality. To be an instrumentality, an entity must be "so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned," or "so intimately connected with the exercise of a power or the performance of a duty by the Government that taxation of it would be a direct interference with the functions of government itself." *Id.* at 735, 102 S.Ct. at 1383 (citations and internal quotation marks omitted) (emphasis added).

We accept that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge may be no more intimately connected with the federal government when receiving income than the federal employee in *O'Keefe*. The taxation of a federal judge's income may interfere with the functions of government no more than the taxation of any other federal employee's income. But taxing a federal judge in the performance of his or her judicial duties is fundamentally different from taxing his or her income.

When performing federal judicial duties, a federal judge performs "the functions of government itself," *New*

Mexico, 455 U.S. at 735, 102 S.Ct. at 1383, and cannot realistically be viewed as a separate entity from the federal court. The judge is "so intimately connected with the exercise of [federal judicial] power or the performance of a [federal judicial] duty . . . that taxation of [him] would be a direct interference with the functions of government itself." *Id.* Thus, we hold that a federal judge is a federal instrumentality when the taxed activity is the judge's performance of judicial duties.

We conclude, then, that the intergovernmental tax immunity doctrine bars the imposition of the Jefferson County privilege tax on Judges Acker and Clemon. The privilege tax taxes the activity of working in Jefferson County. As applied to Judges Acker and Clemon, the privilege tax taxes the performance of federal judicial duties in Jefferson County. When performing their judicial duties, Judges Acker and Clemon must be considered instrumentalities of the federal government. The imposition of the privilege tax on Judges Acker and Clemon, therefore, amounts to a direct tax on federal instrumentalities in violation of the intergovernmental tax immunity doctrine.

Our conclusion that the Constitution bars levying the privilege tax on Judges Acker and Clemon follows not only from a formal application of the intergovernmental tax immunity doctrine but also from adherence to the doctrine's overarching purpose. The imposition of the privilege tax on federal judges is apt to lead to the clashing sovereignty that the Supremacy Clause seeks to avoid. By its very terms and in practical effect, Ordinance No. 1120 may be applied to federal judges only at the risk of interfering with the operation of the federal judiciary.

According to its plain language, the ordinance makes it unlawful for a federal judge to perform his or her duties in Jefferson County without paying the privilege tax. The County argues that Alabama counties have no power to prosecute anyone criminally for failure to pay the privilege tax.¹⁴ While Alabama counties currently lack the power to impose criminal sanctions for failure to pay the privilege tax, the comfort that this omission provides may be short-lived; the Alabama legislature could of course provide a criminal penalty provision applicable to counties like the provision applicable to cities and towns.¹⁵

Regardless of whether a county possesses the power under Alabama law to make unlicensed work a crime, a federal judge in Jefferson County who for some reason fails to pay the privilege tax is deemed by Jefferson County to act unlawfully when he performs his judicial duties. We have no doubt that, under the Supremacy Clause, Jefferson County could not enjoin or otherwise prevent a federal judge from performing federal duties. But we believe that the Supremacy Clause protects the federal judiciary not only from outright obstruction but also from a requirement that a federal judge pay a fee to

¹⁴ The ordinance is not backed by criminal penalties, the County argues, so it is "unlawful" to work without paying the privilege tax only in the sense that it is "unlawful" to refuse to pay any civil debt.

¹⁵ At oral argument, counsel for Jefferson County stated that the County appears to have copied Birmingham's privilege tax ordinance verbatim. Under Alabama law, a city, unlike a county, does have the power to criminally prosecute and punish violators of a license tax ordinance. Ala.Code § 11-51-93.

lawfully perform his or her duties. See *Mayo v. United States*, 319 U.S. 441, 447, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504 (1943) (holding that Supremacy Clause prohibits state from requiring United States to pay privilege tax before executing a function of government); *Johnson v. Maryland*, 254 U.S. 51, 57, 41 S.Ct. 16, 16-17, 65 L.Ed. 126 (1920) (holding that state may not require federal postal employee to obtain state driver's license before performing official duties). Any attempt by a state or local government to tell a federal judge what he or she must do to lawfully perform federal duties offends elemental notions of federal supremacy.¹⁶

In practice, any attempt to apply Ordinance No. 1120 to federal judges threatens to lead to clashing sovereignty. Enforcement of the privilege tax requirement

¹⁶ The Supreme Court has described the freedom of the federal courts from state interference, albeit in a different context, in this way:

It may not be doubted that the judicial power of the United States as created by the Constitution . . . is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that . . . the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application.

Harrison v. St. Louis & San Francisco R.R. Co., 232 U.S. 318, 328, 34 S.Ct. 333, 335, 58 L.Ed. 621 (1914).

against federal judges risks intrusion into a federal judge's judicial affairs. To determine the amount of a federal judge's privilege tax, Jefferson County must determine what percentage of the judge's duties were performed in Jefferson County. We question whether a state or local government may inquire into precisely how and where a federal judge spends time on judicial duties; even if permissible, such an inquiry is apt to engender intergovernmental conflict. A further source of conflict is the practical effect of the privilege tax¹⁷ on federal judges' willingness to sit or otherwise perform duties in Jefferson County.

We note that, in the performance of federal judicial duties, non-resident federal judges often are called upon to sit in Jefferson County. *United States v. Tokars*, 839 F.Supp. 1578 (N.D.Ga.1993), is just one example. *Tokars* was a federal criminal racketeering prosecution involving allegations that the murder of a young woman in front of her two children was committed by two hitmen hired by her husband, an Atlanta attorney. Atlanta, the case's original venue, was saturated with publicity about the case. To safeguard the defendant's constitutional right to a fair trial, a district judge for the Northern District of Georgia granted the defendant a change of venue and spent five weeks in Birmingham trying the case. Under Ordinance No. 1120, the Atlanta-based federal judge would owe Jefferson County a percentage of her salary because she

¹⁷ The effect includes the burden of recordkeeping and disclosure requirements.

chose Birmingham as the most appropriate venue where the accused could get a fair trial.¹⁸

C. Congressional Consent to State Taxation

Congress generally has the power to consent to state taxation of federal employees, operations, and instrumentalities. *Mayo*, 319 U.S. at 446, 63 S.Ct. at 1140. Jefferson County argues that Congress, in the Public Salary Act and the Buck Act, consented to all forms of state and local taxation of federal employees, including federal judges. Therefore, we examine whether the Public Salary Act and the Buck Act constitute consent to the imposition of the privilege tax on federal judges. The district court held that, under Article III, Congress may not consent to the imposition of the privilege tax on federal judges. Because we find that Congress did not consent to the imposition of the privilege tax on federal judges, we need not address Congress's power to do so.

1. Public Salary Act

The Public Salary Act provides in relevant part:

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of

¹⁸ When questioned at oral argument about whether the *Tokars* judge owes the privilege tax for trying the case in Birmingham, counsel for Jefferson County replied: "Under ordinance yes, I believe she does, I believe she does."

Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111. The Public Salary Act does not define the "taxation of pay or compensation for personal service" to which the United States consents. The County contends that Congress consented to the imposition on federal employees of *all* nondiscriminatory state and local taxes, including nondiscriminatory privilege taxes.

We do not interpret the Public Salary Act's consent to state taxation of federal employees' compensation as encompassing the imposition of privilege taxes such as Jefferson County's. The Public Salary Act must be read in light of the uncertain state of the intergovernmental tax immunity doctrine at the time of the Act's enactment. Before the Act was proposed, the Supreme Court held that the federal government could levy nondiscriminatory taxes on the incomes of state employees. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 811-814, 109 S.Ct. 1500, 1505-06, 103 L.Ed.2d 891 (1989) (describing context of Act's enactment). The primary purpose of the Act was to amend the federal tax code to clarify that the federal income tax applied to the income of all state and local government employees. *Id.* at 811, 109 S.Ct. at 1505. See also H.R.Rep. No. 26, 76th Cong., 1st Sess., 3-4 (1939); S.Rep. No. 112, 76th Cong., 1st Sess. 11 (1939).

Congress was concerned, however, that considerations of fairness dictated equal tax treatment of federal and state employees. *Davis*, 489 U.S. at 812, 109 S.Ct. at

1506. The Supreme Court had decided *Dravo* but had not yet held in *O'Keefe* that the intergovernmental tax immunity doctrine does not bar states from taxing the income of federal employees. Thus, Congress entertained doubts about whether states could tax federal employees' income without Congress's consent. *Id.* at 811-812, 109 S.Ct. at 1506. To ensure equal tax treatment of all government employees, therefore, Congress decided to consent to state and local taxation of federal employees' income. *Id.* at 812, 109 S.Ct. at 1506. Congress's consent turned out to be unnecessary; *O'Keefe* was decided before the Act was enacted. *Id.* Congress nevertheless enacted the provision consenting to state and local taxation of federal employees' compensation, effectively codifying the result in *O'Keefe*. *Id.*

The context of the Act's enactment thus reveals that Congress intended to consent to state taxation of federal employees' income to reciprocate for the imposition of the federal income tax on state employees. The Act does not consent to all state taxes on federal employees. We discern no congressional intent to consent to state taxes that in substance are not taxes on income. Thus, we interpret "taxation of pay or compensation for personal service," 4 U.S.C. § 111, to refer to state taxes on income. The Public Salary Act does not alter the intergovernmental tax immunity doctrine; in effect, it just codifies the result in *O'Keefe*. *Davis*, 489 U.S. at 813, 109 S.Ct. at 1506.¹⁹

¹⁹ Our interpretation of the Public Salary Act as consenting only to taxes that in substance tax income is not inconsistent with the Third Circuit's decision in *United States v. City of Pittsburgh*, 757 F.2d 43 (3rd Cir.1985). Adopting a broad reading

2. The Buck Act

The County also contends that Congress consented to taxes such as the Jefferson County privilege tax in the Buck Act, 4 U.S.C. §§ 106-110. The Buck Act provides in relevant part:

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. § 106(a). Unlike the Public Salary Act, the Buck Act defines the state taxation to which the United States consents. The Buck Act defines "income tax" as "any tax

of "taxation of pay or compensation," the Third Circuit held that the Public Salary Act consented to Pittsburgh's levy of a privilege tax on a court reporter's transcript fee income. *Id.* at 47. Unlike the Jefferson County privilege tax, the Pittsburgh privilege tax was in substance a tax on income. The Third Circuit found that, despite its "privilege tax" label, the Pittsburgh tax was "clearly a tax on gross receipts or gross income from the fees." *Id.* Though the Third Circuit did not discuss how it arrived at that conclusion, our examination of the Pittsburgh ordinance reveals that the ordinance did not include the factors that distinguish the Jefferson County ordinance from an income tax. See Pittsburgh, Pa., Ordinance No. 675 (Dec. 27, 1968).

levied on, with respect to, or measured by, net income, gross income, or gross receipts." *Id.* § 110(c).

The district court found that the privilege tax falls within the Buck Act's definition of an "income tax" because the privilege tax is measured by gross receipts. We agree that the Buck Act's definition of "income tax" encompasses the privilege tax. But another provision of the Buck Act removes the privilege tax from the Buck Act's consent to state taxes. Echoing the intergovernmental tax immunity doctrine's prohibition against state taxes levied directly on the federal government, the Buck Act provides that its provisions "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof." *Id.* § 107(a). According to the Supreme Court, "[t]his section can only be read as an explicit congressional preservation of federal immunity from state . . . taxes unconstitutional under the immunity doctrine announced by Mr. Chief Justice Marshall in *McCulloch v. Maryland*." *State Tax Commission of Mississippi*, 421 U.S. at 612, 95 S.Ct. at 1880. Therefore, the Buck Act does not alter the intergovernmental tax immunity doctrine or constitute consent to the privilege tax.

Indeed, the Buck Act's effect on the ability of states to tax federal employees is much more modest than Jefferson County suggests. According to its plain language, the Buck Act merely precludes a taxpayer from arguing that a state or locality lacks jurisdiction to tax her because she resides in a federal area or receives income from transactions or services in a federal area. 4 U.S.C. § 106(a). The Buck Act equalizes taxing power within and without federal areas, allowing states and localities to

levy taxes within federal areas "to the same extent and with the same effect" as without federal areas. *Id.* The Buck Act does not, however, affect the limits on state and local taxing power in any other way.²⁰

The Supreme Court addressed the effect of the Buck Act on state and local taxation within federal areas in *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953). In *Howard*, employees of a naval ordnance plant located on federal land in Louisville, Kentucky, challenged the City of Louisville's attempt to collect from them a license fee for the privilege of working in Louisville. *Id.* at 625, 73 S.Ct. at 466. The Supreme Court noted that the United States had exclusive jurisdiction over the federal area, except as modified by statute. *Id.* at 627, 73 S.Ct. at 467. The Court held that the license fee was an "income tax"

²⁰ The Buck Act was enacted in 1940 against the background of the just-enacted Public Salary Act. The Public Salary Act's consent to state income taxes failed to reach federal employees residing and working in federal areas because, without congressional consent, the states lacked jurisdiction to tax transactions occurring in federal areas. *United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301, 309 (3rd Cir.1976); *United States v. City and County of Denver*, 573 F.Supp. 686, 691 (D.Colo.1983) (citing S.Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940)). The Buck Act therefore was enacted to eliminate the disparity between the income tax liability of federal employees within federal areas and those outside federal areas. *Lewisburg Area Sch. Dist.*, 539 F.2d at 309; *City and County of Denver*, 573 F.Supp. at 691. It does so by eliminating immunity based solely on the ground that the taxpayer resides in a federal area or receives income from transactions or services in a federal area. The Act does not affect claims of tax immunity based on other grounds. See S.Rep. No. 1625, 76th Cong., 3d Sess. 2-3 (1940).

under the Buck Act, *id.* at 629, 73 S.Ct. at 468, and that the Buck Act therefore granted Louisville the right to impose the license fee on the federal employees working at the ordnance plant. *Id.* at 628, 73 S.Ct. at 467. The Court explained, "By virtue of the Buck Act, the tax can be levied and collected within the federal area, just as if it were not a federal area." *Id.* at 629, 73 S.Ct. at 468.

The County suggests that the Buck Act authorizes Jefferson County to levy its license fee on federal judges just as the Buck Act was held in *Howard* to authorize Louisville to levy its license fee on federal employees of the ordnance plant. The challenge to the Jefferson County privilege tax, however, differs significantly from the challenge in *Howard*. Judges Acker and Clemon do not contend that Jefferson County may not tax them because they work within a federal area. Rather, they argue that, regardless of where in Jefferson County they perform their duties, Jefferson County may not levy the privilege tax on them because to do so would amount to a direct tax on instrumentalities of the federal government in violation of the intergovernmental tax immunity doctrine. The federal employees in *Howard*, in contrast, did not contend that the license fee directly taxed the federal government. They challenged the license fee solely on the one ground barred by the Buck Act – that Louisville lacked jurisdiction to tax in a federal area – and the Supreme Court addressed only that ground. Thus, *Howard* does not address the issue presented here.

Nothing in *Howard* undermines our conclusion that the Buck Act does not alter the intergovernmental tax immunity doctrine's limits on state and local taxation.

Howard cannot be read, for example, as an implicit rejection of intergovernmental tax immunity from privilege taxes falling within the Buck Act's definition of "income tax." An intergovernmental tax immunity challenge, if raised by the *Howard* employees, would have failed not because the Buck Act precluded such a challenge but because the Louisville license fee did not amount to a direct tax on the federal government or its instrumentalities. Assuming that the taxed activity was working in Louisville, the *Howard* employees could not be considered the federal government or its instrumentalities when performing their duties. Unlike federal judges, employees of a naval ordnance plant realistically can be viewed as separate entities from the federal government when performing their duties; they are not "intimately connected with the exercise of a power or the performance of a duty by the Government." *New Mexico*, 455 U.S. at 736, 102 S.Ct. at 1383. Thus, that *Howard* upheld the application of the Louisville license fee to federal employees does not imply that the Buck Act precludes an intergovernmental tax immunity challenge to the application of Ordinance No. 1120 to federal judges.

V. CONCLUSION

As applied to federal judges, the privilege tax violates the intergovernmental tax immunity doctrine as a direct tax on the federal government or its instrumentalities. We hold, therefore, that the Supremacy Clause prohibits Jefferson County from applying Ordinance No. 1120 to Judges Acker and Clemon.

AFFIRMED.

ANDERSON, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

I also dissent for the several reasons set forth by Judge Birch. I can discern no principled way to avoid the conclusion that the instant county ordinance is in substance an income tax for purposes of federal law. I respectfully submit that the majority's attempt to distinguish *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953), is flawed. In *Howard*, the Supreme Court interpreted the Buck Act's provision that no person shall be relieved from liability for state or local income tax by reason of residing on federal property or working on federal property. 4 U.S.C.A. § 106(a). The Supreme Court held that an almost identically worded ordinance was in substance an income tax. The majority attempts to distinguish *Howard* by pointing to the exclusion provision in the Buck Act - i.e. that the Buck Act shall not be deemed to authorize taxation of the "United States itself or any instrumentality thereof." 4 U.S.C.A. § 107(a). Although the majority correctly points out that this provision confirms the continued applicability of the intergovernmental tax immunity doctrine, the majority's attempted distinction fails to recognize that an *income tax* is clearly not barred by the tax immunity doctrine and that the Buck Act and *Howard* indicate that the instant ordinance *is* in substance an income tax.

Having concluded that the instant tax is as a practical matter an income tax, it follows that it is not barred by the intergovernmental tax immunity doctrine because tax

upon the income of a federal employee, however important the position,¹ is not a tax upon the United States or an instrumentality thereof.² The test is whether the tax obstructs or interferes with the performance of the federal function. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477, 481, 484, 59 S.Ct. 595, 597, 598-9, 600, 83 L.Ed. 927 (1939). As Judge Birch persuasively points out, the instant tax neither obstructs nor interferes with the performance of the judge's functions. Indeed, the district court so found.

I respectfully dissent.

BIRCH, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

I respectfully dissent. The linchpin of the majority opinion is that the tax at issue in this case is something other than an income tax.¹ If the tax at issue is a tax on

¹ Because the instant tax is an income tax, and because a state or local tax upon a federal judge's income is not barred by the intergovernmental tax immunity doctrine, I need not address the majority's assertion that the acts of federal judges (in performing their official duties) are acts of the United States or an instrumentality thereof.

² As Judge Birch points out so forcefully, the majority acknowledges this.

¹ Throughout the majority opinion, Judge Cox is steadfast and candid in acknowledging that should this tax be a tax on income, it would not run afoul of the Supremacy Clause and the intergovernmental tax immunity doctrine predicated thereon, to wit:

But "[t]he theory . . . that a tax on income is legally or economically a tax on its source [was] no longer

tenable" after [*James v. Dravo* [Contracting, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937)]. [*Graves v. New York ex rel. O'Keefe*, 306 U.S. 466] at 480, 59 S.Ct. [595] at 598, 83 L.Ed. 927 [(1939)]].

Maj.Op. at 3359.

* * *

If Jefferson County is correct that, despite being labeled a "license fee," the privilege tax amounts to an income tax, then it constitutionally may be applied to Judges Acker and Clemon under *O'Keefe*.

Maj.Op. at 3361.

* * *

We have no doubt that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge is no more intimately connected with the federal government when receiving income than the federal employee in *O'Keefe*. The taxation of a federal judge's income interferes with the functions of government no more than the taxation of any other federal employee's income.

Maj.Op. at 3364.

* * *

Congress . . . enacted the provision [4 U.S.C. § 111, The Public Salary Act] consenting to state and local taxation of federal employees' compensation, effectively codifying the result in *O'Keefe*. [*Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 at 812, 109 S.Ct. 1500 at 1506, 103 L.Ed.2d 891 (1989)].

Maj.Op. at 3367.

* * *

We discern no congressional intent to consent to state taxes that in substance are not taxes on income. Thus, we interpret "taxation of pay or compensation

income, as defined by federal law,² the judges must pay

for personal service," 4 U.S.C. § 111, to refer to state taxes on income.

Id.

* * *

We agree that the Buck Act's [4 U.S.C. §§ 106-110] definition of "income tax" encompasses the privilege tax.

Maj.Op. at 3368.

² In *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (3d Cir.1985), the Third Circuit, in adjudicating a challenge by the United States to the taxation of an official court reporter working in the federal district court (who the panel found to be an officer of the court), observed:

The United States contends, however, that section 111 does not apply because the City's tax is not a tax on compensation. It argues that the section applies only to income taxes, and that because the business privilege tax is not a net income tax, it is not tax on compensation within the meaning of section 111. For support, it cites *F.J. Busse Co. v. City of Pittsburgh*, 443 Pa. 349, 353, 279 A.2d 14, 16 n. 1 (1971), which held that the City's business privilege tax is not an earned income tax under Pennsylvania law. However, the question of whether Congress consented to the imposition of the business privilege tax is a question of Congressional intent, and therefore determined with reference to federal law. See *Howard v. Comm'rs of the Sinking Fund*, 344 U.S. 624, 628-29, 73 S.Ct. 465, 467-68, 97 L.Ed. 617 (1953) (determination of what is an income tax under the Buck Act is a question of federal law).

Congress, in enacting section 111, intended that "[federal employees] should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits

which are accorded to persons engaged in private occupations." S.Rep. No. 112, 76th Cong. 1st Sess. 4 (1939). A broad reading of the meaning of "taxation on . . . compensation" would comport with that intent. Further, in enacting the Public Salary Tax Act of 1939, Congress was aware that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes. S.Rep. No. 112, 76th Cong. 1st Sess. 6-10 (1939). In this case, the City's tax is clearly a tax on gross receipts or gross income from the fees. We believe that the City's business privilege tax in this case is within the language and intent of section 111.

* * *

We therefore hold that if there were any federal constitutional immunity from the imposition of the City's business privilege tax on a federal court reporter's transcript fee income, that immunity was waived by Congress.

(emphasis added). The majority opinion attempts to distinguish this case from the instant case in footnote 1 on page 3364 of its opinion.

The majority professes not to be bound by the Alabama Supreme Court's *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972) conclusion that the privilege tax is not an "income tax," Maj.Op. at 3362, yet, in the next sentence the majority asserts " . . . if the state court's determination is a reasonable interpretation of the ordinance, we deem it conclusive. See *Gurley v. Rhoden*, 421 U.S. 200, 208, 95 S.Ct. 1605, 1610 [44 L.Ed.2d 110] (1975)." However, *Gurley* had nothing to do with the determination of whether a state tax was an income tax for the purpose of federal law. Moreover, the Supreme Court expressly accorded great weight to the state court's findings regarding the legal incidence of a state tax strictly within the context of state law. *Gurley*, 421 U.S. at 208, 95 S.Ct. at 1610.

the \$668.00 per year that the county has levied.³ Despite the conclusion of the majority that this tax "may be applied to federal judges only at the risk of interfering with the operation of the federal judiciary," Maj.Op. at 3364, the independence of the federal judiciary surely will survive such a tax; as Justice Oliver Wendell Holmes (joined by Justice Louis O. Brandeis) observed:

To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of [Article III, § 1] of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

³ The annual salary of a federal district judge is established by law and is currently \$133,600. See 28 U.S.C. §§ 135, 461 (1993). Applying the one-half percent privilege tax, an annual tax of \$668.00 would result. It is indeed sobering to reflect upon the expenditure of taxpayers' dollars involved in the resolution of the issue before this court. The legal fees and time expended by Jefferson County in order to recover these relatively paltry amounts should be distressing enough to that county's citizens. However, considering the expenditure of federal judicial resources (a district judge's initial consideration, a three-judge panel of this court, and now an *en banc* consideration by twelve judges of our court) one can only wonder if the principle at issue here is really all that significant. Common sense whispers to me that this is the classic tempest in a teapot involving more the clash of powerful egos rather than powerful principles. The outcome of this issue may dent the coffers of Jefferson County or a few federal judges but will speak little to the separation-of-powers principle used to justify this considerable expenditure of public resources.

Evans v. Gore, 253 U.S. 245, 265, 40 S.Ct. 550, 557, 64 L.Ed. 887 (1920) (Holmes J., dissenting). I continue to maintain that the Jefferson County tax is not a direct tax on the federal judiciary, but is an individualized tax on the earnings of judges and all others subject to the ordinance. Although Article III judges together compose the federal judiciary, they are also citizens of the country, state and localities where they reside. As emphasized by the Supreme Court in *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939):

To suggest that [the income tax] makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

Id. at 282, 59 S.Ct. at 840 (footnote omitted).

There is currently no issue before this court that suggests that the privilege tax in this case discriminates against federal employees. The original panel opinion addressed that issue and concluded that the occupational tax does not discriminate unconstitutionally against federal employees. *Jefferson County v. Acker*, 61 F.3d 848, 852-53 (11th Cir.1995), *vacated and rehearing en banc*

granted, 73 F.3d 1066 (11th Cir.1996). As noted above, the dispositive issue is whether this tax is an income tax under federal law. In a case addressing the issue of inter-governmental tax immunity the Supreme Court admonished:

[I]n passing on the constitutionality of a state tax "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Commission*, 286 U.S. 276, 280, 52 S.Ct. 556, 557, 76 L.Ed. 1102. Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance.

City of Detroit v. Murray Corp. of Amer., 355 U.S. 489, 492, 78 S.Ct. 458, 460, 2 L.Ed.2d 441 (1958). In this case, the majority concedes that "[t]he district court found", and "Judges Acker and Clemon do not question", "that the privilege tax imposes no economic burden on the federal government itself; it is paid by individual federal judges out of their own pockets." Maj.Op. at ____; see also *Jefferson County v. Acker*, 850 F.Supp. 1536, 1544 (N.D.Ala.1994), *rev'd*, 61 F.3d 848 (11th Cir.1995), *vacated and reh'g en banc granted*, 73 F.3d 1066 (11th Cir.1996). Yet the majority concludes that the tax at issue is not one on income.

The Supreme Court previously has upheld an analogous ordinance, also denominated as a "license fee" by the state, as a constitutionally sound income tax. *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953). In *Howard*, the City of Louisville, Kentucky, enacted an ordinance collecting a "license tax

for the privilege of working in the city, measured by one percent of all salaries, wages and commissions earned in the city." *Id.* at 625, 73 S.Ct. at 466. Federal employees working within the jurisdiction of the Navy Department contended that the tax impermissibly functioned as a fee for doing business with the United States. The Supreme Court, however, held that the tax established by the ordinance was an income tax. Quoting the Buck Act, 4 U.S.C. §§ 105-110, the Court stated that an " 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." *Id.* at 628, 73 S.Ct. at 467. Although the state court had held that the tax was not an income tax, the Court declared:

[T]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts. . . . We hold that the tax authorized by this ordinance was an income tax within the meaning of the federal law.

Id. at 628-9, 73 S.Ct. at 468 (emphasis in original). It seems to me that the Supreme Court's reasoning and disposition in *Howard* are very instructive, if not binding, with respect to this case. The majority attempts to minimize the precedential force of *Howard* by distinguishing employees of a naval ordinance [sic] plant who "can be viewed as separate entities from the federal government when performing their duties" from federal judges because the latter are " 'intimately connected with the exercise of a power or the performance of a duty by the Government.' " Maj.Op. at ____ (quoting *United States v.*

New Mexico, 455 U.S. 720, 738, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580 (1982)). In *Howard*, however, the Supreme Court explicitly concluded that the tax in question - which was defined in terms identical to the tax at issue in this case - was an income tax within the meaning of the Buck Act. 344 U.S. at 468, 73 S.Ct. at 468. The Court's finding that the tax was an income tax under the Buck Act was inextricably linked to its conclusion that individuals working in a federal area within Louisville were subject to the tax. I believe that the Buck Act and the Supreme Court's interpretation thereof compel the conclusion that the Jefferson County tax, which is by its terms indistinguishable from the tax described in *Howard*, is an income tax to which federal judges in Jefferson County are subject.

The majority, relying principally on Alabama's characterization of the tax and distinguishing *Howard* in a manner that fails to explain the Supreme Court's equation of a license occupation tax with an income tax, concludes "[i]n substance, the privilege tax does not tax the receipt of income." Maj.Op. at _____. Focusing on two provisions of the ordinance, the majority concludes that the "tax does not *merely* tax the receipt of income." *Id.* First, the majority notes that the tax is levied not only on income received but also on income that one is entitled to receive. This tax concept is certainly not novel in the realm of income taxation, either state or federal. See *In re Kochell*, 804 F.2d 84, 85 (7th Cir.1986) (stating that "in tax law a payment attributable to a person's earnings that bypasses him and goes to his designees is taxed as a payment to him"); *Bank of Coughatta v. United States*, 650 F.2d 75, 77

(5th Cir. Unit A 1981) (noting that "[a] taxpayer is considered in constructive receipt of income if it is available to him without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is made, and the Commissioner will assess taxes on the basis of this income. . . .") The majority posits that this provision demonstrates that "the ordinance is concerned with ensuring that work is taxed regardless of whether income from the work is actually received." Maj.Op. at _____. While such an explanation is not incredible, it is more likely that the traditional and typical rationale for the taxation of entitlement to income noted above is more plausible.

The majority concludes that because the ordinance exempts persons paying license fees to Jefferson County or to the State of Alabama, it "makes sense only if the ordinance aims to ensure that a license fee is paid to some unit of government for all work performed in Jefferson County." *Id.* An equally plausible explanation is that the exemption exists to prevent double taxation of wage earners in that jurisdiction – particularly when the other qualifying fees may also be computed on the receipt or entitlement from wage or fee income. The deduction or exemption of state and local taxes relative to each other or to federal taxable income is a familiar tax mechanism. See 26 U.S.C. § 164(a)(1), (2) and (3) (1988) and Ala.Code § 40-18-15 (1993).

If the burden or interference of the tax is not economic,⁴ what is it? The majority informs us that the complaining judges refuse to pay the tax "because the tax purports to be a precondition to the lawful performance of their federal judicial duties", Maj.Op. at ____ (emphasis added), and holds "that a federal judge is a federal instrumentality when the taxed activity is the judge's performance of judicial duties". *Id.* at _____. Nowhere in the opinion do we find an explanation of just how this declaration of lawful precondition "impedes" or "burdens" the performance of any judicial duties. To paraphrase a popular question posed during the 1980's in fast food advertising: "Where is the 'burden' "? Aside from offending the sensibilities of these affected judges and arousing a sense of apprehension, the ordinance is a paper tiger. As the majority concedes, "Alabama law does not appear to provide criminal sanctions for violating county ordinances requiring the payment of privilege taxes." Maj.Op. at _____. While one can appreciate that these judges, honorable men and women sworn to uphold the law, may feel

⁴ See Computation of the tax set out in footnote 3 of this dissent. Recall that the district court found as a matter of fact that the privilege tax imposes no "monetary (economic) burden on the Federal Government itself." *Acker*, 850 F.Supp. at 1544. Moreover, there has been no analysis of facts or finding by the district court relative to the judges' contention that "the ordinance's onerous time-keeping and return requirements burden the federal judicial function." Maj.Op. at _____. Stated differently, there is nothing in the record before us to establish or substantiate any such conclusion. Moreover, this ordinance's recordkeeping and return requirements appear to be no more onerous than those commonly associated with paying one's federal and state income taxes.

uncomfortable acting "unlawfully" as the ordinance "purports" to characterize their work in the absence of payment of the tax, is that the degree of impediment or burden required to invoke application of the intergovernmental tax immunity doctrine and the Supremacy Clause of the United States Constitution? I doubt it. The burden or impediment, to the extent that one exists in this case is, at best, *de minimis* or ephemeral.

Appendix

BY THE COURT:

ON RECUSAL

We accepted the Appellee's suggestion for rehearing *en banc* of this case to determine the validity, as applied to Article III judges, of a Jefferson County tax imposed on persons working in the County. Given the nature of the controversy, we, at the outset, had to decide whether some or all judges of this Court are disqualified from the case, where nine of the *en banc* panel's twelve judges have sat in Jefferson County at least one day – and some a few days more. We also faced the fact that, though this court has no immediate sittings planned for Jefferson County, all of its judges could be sent to do judicial work in Birmingham (which is in Jefferson) in the future. Counsel for the County, however, represented at oral argument that the county has "never" attempted to collect the tax from a federal judge with no chambers in Jefferson County. And, no judge of this Court now keeps chambers in Jefferson County. Nor does this Court maintain a courtroom for its use in Jefferson County.

Appellees included in their Certificate of Interested Persons this phrase: "each Judge of the United States Circuit Court of Appeals for the Eleventh Circuit who has within the last five years performed or may perform any work or duties relating to the judicial function at any office or other location within Jefferson County, Alabama."¹ No motions to recuse have been presented. This listing might be construed as a suggestion of recusal; but in any event, whether 28 U.S.C. § 455 requires recusal is an issue that judges are required to resolve on their own motion. See *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of State of Mississippi*, 637 F.2d 1014, 1020 n. 6 (5th Cir. Unit A 1981). Because the integrity of the judiciary is in issue, moreover, the issue should be resolved "at the earliest possible opportunity." *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 712 (7th Cir.1986).

Whether a judge is disqualified, that is, must not take part in deciding a case, is a question of law. See *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir.1983). Title 28 U.S.C. § 455 requires recusal whenever a judge's impartiality "might reasonably be questioned," *id.* § 455(a), or when he "has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding." *Id.* § 455(b)(4). The statute defines "financial

¹ The significance of the five-year figure is unclear. We assume, for purposes of this opinion only, that no statute of limitations has run that would prevent the collection of taxes imposed based on the 9 October 1990 *en banc* sitting, in which most of the present Court heard argument in Jefferson County.

interest" to mean "ownership of a legal or equitable interest, however small . . . in the affairs of a party. . . ." *Id.* § 455(d)(4).

The Ordinance may arguably authorize Jefferson County to compel the payment of half of one percent of the income received for those days worked in the County. So, for example, for those judges who sat in Birmingham on 9 October 1990 – the last day the Court of Appeals has sat in Birmingham and the only day most of our judges have sat in Jefferson County – the Ordinance might mean they could be assessed for half of one percent of 1/365 of their salary for 1990, which comes to roughly a dollar and a half. We doubt the reasonable observer would think the integrity of federal judges could be bought so cheaply.

We looked at the two potential "interests" of the court's judges, in accordance with 28 U.S.C. § 455(b)(4) – financial interests and "other" interests. Considering the statutory definition of "financial interest," the term may be totally inapplicable here; but we do not rely on a strict reading. In *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir.1980), the court wrote these words:

We agree with the Fourth Circuit's determination that a remote, contingent benefit, such as a possible beneficial effect on future utility bills, is not a "financial interest" within the meaning of the statute. It is an "other interest," requiring disqualification under a "substantially affected" test.

Id. (citing *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir.1976)). That case involved an antitrust claim alleging

that various oil companies were fixing the price of natural gas at the well head. Relief was sought, among other things, on behalf of a class of residential customers in New Mexico where all the federal judges of the District of New Mexico resided. The Tenth Circuit held that the possible beneficial effect on the future utility bills of those judges was a remote and contingent benefit and, thus, was no "financial interest." Rather, the interest was an "other interest" which would require disqualification only if the interest "could be substantially affected by the outcome of the proceeding." The possible beneficial effect on future rates was found to be remote and contingent, because, among other things, the rate setting agency might not pass on the cost savings to consumers. *Accord In re Virginia Elec. & Power Co.*, 539 F.2d 357, 366-67 (4th Cir.1976).

We agree with the Tenth and Fourth Circuits that the term "financial interest" is limited to *direct* interests and does not include remote or contingent interests. We believe that the judges' interest in this case is even more remote and contingent than in the Tenth and Fourth Circuit cases. Jefferson County has represented that its tax has never been assessed against a federal judge without chambers in Jefferson County, and no judge of this Court maintains chambers in Jefferson County. Some judge of this Court might occasionally sit in Jefferson County as a member of a three-judge district court; but these duties are not common. Moreover, the possibility that a particular judge of this Court will be specially assigned in the future to hear a case in Jefferson County is wholly speculative. Considering the low expectancy – regardless of how this case might be decided – that the

tax will be assessed against judges who have no chambers or courtroom in Birmingham, we have concluded that the judges of this Court have no "financial interest" in the subject matter in controversy in this case.

Having determined that the judges' interest in this case is not a "financial interest," but is an "other interest," disqualification is required only if the interest "could be substantially affected by the outcome of the proceeding." We readily conclude that this provision does not require recusal. It is unlikely that the tax will ever be assessed against a judge of this Court because none have chambers in Jefferson County. And even if the tax were assessed against non-resident judges, we do not believe the "substantially affected" standard would be satisfied. Special assignments to sit in Birmingham are uncommon, and any such assignment would probably be of short duration and thus give rise to a de minimis tax.²

Our conclusion and reasoning is supported by opinions of the Codes of Conduct Committee of the Judicial

² For the same reasons, we also conclude that no one could reasonably question the impartiality of the judges of this Court. We also have considered whether non-financial interests in the case's outcome might require recusal of judges. We concluded that the potential administrative burdens and intrusiveness of the Ordinance (again viewed against the likelihood of no tax ever being assessed against a judge now on this court) did not require recusal. For cases finding no need to recuse for non-financial interests tied to the Article III function, see *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1266 (11th Cir.1984); *Duplantier v. United States*, 606 F.2d 654, 662-63 (5th Cir.1979).

Conference of the United States. The committee has interpreted language in the Code of Conduct for United States Judges in a similar way (the Code's words track closely the financial interest language of section 455). See generally *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 715 (7th Cir.1986) ("In matters of judicial ethics we are bound to give some weight to the view of the committee of judges that the Judicial Conference of the United States has established to advise federal judges on ethical questions."). In its Advisory Opinion No. 62, the committee advised that a judge should recuse from a case involving a utility to which he was a ratepayer only if he stood to receive savings that "might reasonably be considered substantial." The committee has also advised, in the same context, that a potential billing increase of "60 cents per month as of 1984 plus normal increases is not considered substantial." *Guide to Judiciary Policies and Procedures*, Vol. II, Ch. V, Compendium § 3.1-7[1](c) (1995).

Our decision to go forward with deciding the case was confirmed by the "rule of necessity," which rule "requires that 'where all are disqualified, none are disqualified.'" *In re City of Houston*, 745 F.2d 925, 930 n. 9 (5th Cir.1984) (quoting *Pilla v. American Bar Ass'n*, 542 F.2d 56, 59 (8th Cir.1976)). See generally *United States v. Will*, 449 U.S. 200, 217-19, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980) (section 455 was not intended to abridge rule of necessity). Applying the rule, this court has held that where a case is framed as one that "involves important Article III concerns" of interest to "all Article III judges, wherever located," the rule of necessity instructs judges to refrain from recusal. *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1266 (11th Cir.1984).

Also, this court held in *Duplantier v. United States*, 606 F.2d 654, 662-63 (5th Cir.1979) (considering constitutionality of Ethics in Government Act provisions requiring filing of personal financial reports by judges), that where all members of the judiciary have some interest in the outcome, none are disqualified, even if the levels of interest of individual judges vary somewhat. *See id.* at 662 (noting specific characteristics of interest of judges who had already filed reports). Every United States circuit judge in the country is eligible to be sent to Jefferson County to do judicial work. *See* 28 U.S.C. § 291 (assignment of circuit judges); *see also id.* § 292 (assignment of district judges). So, this case is one that involves concerns of some importance to Article III judges everywhere.³ Thus, recusal by any one judge of this court would be contrary to the rule of necessity.

Also relevant to the recusal decision and to the application of the rule of necessity was the hardship to the participants and hindrance to judicial economy that would have resulted from a recusal *en masse*. In *City of Houston*, 745 F.2d at 931 n. 9, the court noted that recusal was inappropriate when viewed in the light of the "impracticality and unnecessary hardship that would result from recusal where the grounds are tenuous at best. . . ." *Id.* (citations omitted); *see also id.* (noting relevance of "great inconvenience to the counsel, parties,

³ The principles involved in this case also might affect the application of other taxes to which other federal judges in other places are subject. *See In re Pet. To Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1266-67 (11th Cir.1984) (applying rule of necessity where principles of law involved in case are of substantial interest to all Article III judges).

or judge") (internal quotation marks and citations omitted). Here, recusal would have been especially impractical, because it would have entailed empaneling an entire *en banc* court of judges sitting by designation, an event for which we can find no clear precedent and which raises some jurisprudential questions.⁴

Because we have no interest, financial or other, that requires disqualification under the circumstances and because disqualification under the circumstances would also be contrary to the rule of necessity, we concluded that no member of this court was required to recuse.

ALL THE JUDGES CONCUR IN THE OPINION ON RECUSAL.

⁴ For background, *see United States v. Nixon*, 827 F.2d 1019, 1021 (5th Cir.1987); *see also Matter of Skupniewitz*, 73 F.3d 702, 705 (7th Cir.1996); *Martinez v. Winner*, 778 F.2d 553, 555 n. 1 (10th Cir.1985), *vacated on other grounds*, *Tyus v. Martinez*, 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 333 (1986).

Our conclusion for this case would be the same even if it were plainly lawful to empanel an *en banc* court for this Circuit composed of non-disqualified judges drawn exclusively from other circuits; the rule of necessity has been applied, by one court at least, even where fewer than all judges of a single district court would be disqualified. *See City of Houston*, 745 F.2d at 931 n. 9 (applying the rule of necessity where "no resident Houston district judge would be qualified if [the pertinent district judge] were held to be disqualified;" district included cities in which district judges were resident other than Houston).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JEFFERSON COUNTY, a Political	:	
subdivision of the State of Alabama,	:	
	:	
Plaintiff,	:	93-M-0069-S
	:	
v.	:	
WILLIAM M. ACKER, JR.,	:	
	:	
Defendant.	:	93-M-0196-S
	:	
JEFFERSON COUNTY, a Political	:	
subdivision of the State of Alabama,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
U. W. CLEMON,	:	
	:	
Defendant.	:	

ORDER

(Entered Mar. 31, 1994)

These actions come before the Court on cross-motions for summary judgment, as well as certain procedural motions. They were filed in the District Court of Jefferson County, Alabama, seeking to recover taxes allegedly due plaintiff by defendants pursuant to Jefferson County Ordinance No. 1120 of 1987, and subsequently were removed to this Court pursuant to 28 U.S.C. § 1442. By order of February 23, 1993, these actions have been consolidated.

The parties agree that the relevant, material facts in this case are relatively simple and undisputed and that

the issues presented involve questions of law only.¹ The material undisputed facts are set out in Attachment A to this Order.

The questions of law presented by the cross-motions for summary judgment are:

- (1) Does Jefferson County Ordinance 1120 discriminate against defendants by reason of the federal source of their pay or compensation contrary to 4 U.S.C. §§ 105-111?
- (2) If not, does Jefferson County Ordinance 1120 contravene the Constitution of the United States as applied to the defendant Article III judges?

I. MOTIONS FOR SUMMARY JUDGMENT

A. Statutory Construction

Plaintiff, Jefferson County, claims the right to impose "a privilege, license or occupational tax" upon defendants pursuant to: (1) Jefferson County Ordinance 1120 which imposes a tax of 1/2 of 1% on the gross income from the "vocation, occupation, calling or profession" subject to the tax; (2) Alabama Act 406 of 1967, (3) 4 U.S.C. § 111 (the Public Salary Act), and (4) 4 U.S.C. §§ 105-110 (the Buck Act). Defendants, United States District Judges, claim that the imposition of such "a license or privilege tax" would be unconstitutional as applied to them, or, if

¹ Defendant Acker points out, however, that at most, plaintiff would be entitled to partial summary judgment on the issue of liability only because the amounts which defendants would owe in the event of liability are contested.

constitutional, discriminatory as so applied by reason of the source of their pay or compensation contrary to 4 U.S.C. § 111. The issues, therefore, initially require statutory construction, for generally a court must first determine whether the applicable statutes can be construed to avoid a constitutional determination.

Alabama Act 406, approved September 7, 1967, the enabling act,² authorizes Jefferson County to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay such a tax to the State of Alabama. The ordinance itself, enacted pursuant thereto, imposes a privilege, license or occupation tax upon all persons engaged in any "vocation, occupation, calling or profession . . . within the county" not subjected by state law to a privilege, license or occupational tax. The Court regards this as an exercise of the County's taxing, not its police, power.

A federal judge, in performing his or her official duties clearly is engaged in a "vocation," "occupation," "calling" or "profession." A federal judge is not required by state law to pay a privilege, license or occupational tax to the State of Alabama. The language of Act 406 and of

² Plaintiff, a creature of the State, can impose no tax without authority from the State to do so. See Plaintiff's brief filed May 13, 1993, page 16, and cases cited. Plaintiff has no such authority to impose an "income" tax. See *Estes v. City of Gadsden*, 94 So. 2d 744 (Ala. 1957) and cases cited; *McPheeter v. City of Auburn*, 259 So. 2d 833 (Ala. 1972); *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988).

Ordinance 1120 therefore clearly embraces defendant judges.

In 1939, the United States Congress expressly consented to taxation of federal officers' "pay or compensation" by a state or local government.

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111. Further, the Buck Act of 1947 provided:

[n]o person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. § 106(a).

Both 4 U.S.C. § 111 and the Buck Act, 4 U.S.C. §§ 105-110, are facially applicable to the factual situation in this case since a defendant judge's salary undoubtedly

constitutes "pay or compensation for personal service as an officer or employee of the United States" and "income from . . . services performed in such [federal] area." The term "income tax" as used in the Buck Act, 4 U.S.C. §§ 105-109, is defined in 4 U.S.C. § 110(c) as "any tax levied on, with respect to, or measured by, net income, gross income or gross receipts," *id.* (emphasis added), and the tax here involved is clearly "measured by" gross income.

In *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), the Alabama Supreme Court upheld Ordinance No. 1120 against the claim that it violates the Alabama Constitution. Although in its opinion the Alabama Supreme Court did not specifically address the issue of whether Ordinance No. 1120 imposes an unauthorized "income tax,"³ by affirming the trial court (which apparently did consider that issue) it necessarily ruled, at least implicitly, that the tax involved is a valid license tax and is not an income tax.

In fact, the Alabama Supreme Court had previously ruled that another city's virtually identical tax is a "license" tax permitted by the Alabama Constitution, and not an "income" tax. *Estes v. City of Gadsden*, 94 So. 2d 744 (Ala. 1957). The *Estes* Court reasoned: "[i]t will be observed that the amount of the instant tax is measured entirely by gross receipts and, therefore, it is argued that this shows that this is an income tax. But this provision is

³ Since Alabama itself levies an income tax upon all its citizens (Amendment 25 to Alabama Constitution of 1901) such a tax by a county would appear to be prohibited by Article IV, Section 105 of that Constitution.

merely a manner of measuring the tax." *Id.* at 750. In arriving at that result, the *Estes* court quoted from *Nachman v. State Tax Comm'n*, 173 So. 25 (Ala. 1937):

[t]his court more than seventy years ago committed itself to the proposition that a tax upon "the gross amount of sales of merchandise" was not . . . a *property* or *income* tax, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed.

Id. at 31 (citation omitted) (emphasis in original).

Nevertheless, the determination by the Alabama courts that such a County Occupational Tax is a privilege-license tax, and not an "income" tax, is not determinative in this proceeding. The determination of what is an "income tax" under the Buck Act is a question of federal law. *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953). Under federal law, in a case subject to the Buck Act, the method of measurement alone may determine whether a tax is an "income tax." In *Howard*, a Buck Act case, the Supreme Court held that an occupational tax or license fee imposed by the City of Louisville for the privilege of working within the city, albeit in a federal enclave, measured by one percent of income earned within the city, was an "income tax" within the meaning of the Buck Act. "Since the area is within the boundaries of the City of Louisville, and this tax is an income tax within the meaning of the Buck Act, the tax is valid." *Id.* at 629. But Justice Douglas, joined by Justice Black, dissented. "The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. . . . The Congress has not yet granted local authorities the

right to tax the privilege of working for or doing business with the United States." *Id.* See also *United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301, 301-11 (3d Cir. 1976) (applying the Buck Act definition to a school district occupational tax, following *Howard*).⁴

Similarly, the question of the applicability of 4 U.S.C. § 111, the Public Salary Act, is to be decided under federal law. In *United States v. City of Pittsburgh*, 757 F.2d 43 (3d Cir. 1985), decided under the Public Salary Act, the court held that a federal court reporter's fees for the sale of transcripts were "compensation" within the meaning of 4 U.S.C. § 111 which could be taxed under Pittsburgh's business privilege tax. The court noted that "Congress was aware that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Id.* at 47 (citation omitted). The court held that 4 U.S.C. § 111 constitutes consent to the state or local taxation of pay or compensation received by a federal officer or employee, and "waived the United States' right to constitutional sovereign immunity from state taxation of federal employees' income." *City of Pittsburgh*, 757 F.2d at 46. Accord: *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 812 (1988).

⁴ The *Lewisburg* Court apparently had no trouble with an "assessment" based on the "average income of the profession," a method of assessment virtually indistinguishable from a flat license fee for each "profession." 539 F.2d at 310. Yet nominal, per-capita taxes remain prohibited, *Id.* at 311; *United States v. City and County of Denver*, 573 F. Supp. 686 (1983). It is the principle which is important, not the practical impact upon the federal taxpayer.

Since it is undisputed that the Jefferson County Occupational Tax is measured by gross receipts, this Court must conclude that the tax is an "income tax" for purposes of the Buck Act. Although the court in *Pittsburgh* referred to the "taxation of . . . income" (which normally indicates receipt of income as the taxable event) the tax involved was denominated a "business privilege tax" which, again, would normally indicate a franchise or privilege tax.

Defendants suggest that Ordinance 1120 violates the anti-discrimination provision of 4 U.S.C. § 111 in that a great number of potential taxpayers are exempted, or able to pay much less in taxes, because persons required to pay a license tax to the state itself are exempted from taxation under the ordinance. The record so shows. It is clear that factual discrimination is present, but not necessarily that it rises to the level of legal discrimination. Classification for the purpose of municipal licensing⁵ does not require any rigid rule of equality of taxation. It must be substantially fair, but need not be precisely or mathematically equal in operation and effect. However, it may not be arbitrary, capricious or unreasonable. See Eugene McQuillin, *Municipal Corporations*, § 26.60, at 165-66 (3d ed. 1986); *McPheeter*, 259 So. 2d at 833 (1972); *Estes*, 94 So. 2d at 751. The record now before this Court does not demonstrate as a matter of law that any inequality here rises to such a level. Thus, the Court finds the evidence brought to its attention by defendants will not,

⁵ The federal consent ascribed to the Public Salary Act and the Buck Act would not alter the actual nature, characteristics and legal requirements of the tax as imposed by Alabama law.

at this juncture, support defendants' motion for summary judgment on the issue of discrimination.

Therefore, at this point the Court concludes:

1. Jefferson County Ordinance 1120 imposes a "license or privilege tax" upon the performance of defendants' duties as United States District Judges measured by that portion of their incomes earned while physically sitting in the United States Courthouse located in Jefferson County, Alabama.

2. Since the area (the United States District Courthouse in Birmingham, Alabama) is within the boundaries of (Jefferson County), and this (license or privilege) tax is an "income tax" within the meaning of the Buck Act, and purports to be levied "upon" the pay or compensation of defendants, the tax is valid facially. *Howard*, 344 U.S. at 624; *Pittsburgh*, 757 F.2d at 46-48.

In *Howard*, however, the Court recognized that interference with the jurisdiction of the United States might constitute an exception to its brief holding:

[t]he fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Howard, 344 U.S. at 627. See also 4 U.S.C. § 107⁶; *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 379 (1973). Consideration of whether the ordinance at issue constitutes an "interference with the jurisdiction asserted by the Federal Government" so as to involve antagonistic "sovereign rights" involves a constitutional inquiry since the boundary between sovereign federal rights and sovereign state rights is to be found in Article VI, Clause 2 of the United States Constitution. Other constitutional questions arise under Articles II (as it relates to appointment of federal judges) and III of the Constitution of the United States.

B. Constitutional Construction

1. *Is the tax unconstitutional as a direct tax on the United States?*

Defendants contend that Jefferson County Ordinance No. 1120 contravenes the Supremacy Clause, Article VI, Clause 2, of the United States Constitution insofar as it purports to make it unlawful for defendants to *hold the office of United States District Judge* (Ordinance 1120, § 1(c)) or *perform their duties as federal judges in Jefferson County* without paying the license or privilege tax imposed by the ordinance. Ordinance 1120, § 2. It is therefore necessary to determine: (1) the present scope of

⁶ "The provisions of . . . [4 U.S.C. § 106(a)] shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. . . ." 4 U.S.C. § 107.

constitutional intergovernmental tax immunity, and (2) to what extent that immunity is subject to statutory waiver.

To begin, it is basic that the necessary independence of both the federal and state governments forbids that either should tax the courts or the judicial process of the other. *Smith v. Short*, 40 Ala. 385 (1867). See *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 429-33 (1819); 84 C.J.S. § 125 (1954 & Supp. 1993). In *Smith v. Short*, the majority, proceeding directly to the issue of the constitutional limitations on taxation of judicial process⁷, reasoned:

[t]he power of taxation remains in the States, concurrent, and co-extensive with that of congress; with the sole exception of duties on imports and exports, which the States can not impose except by the consent of congress. — 2 Story on Con. § 937. Therefore congress has no more the power to tax judicial process of the State courts, than have the States to tax judicial process of the national courts.

Smith v. Short, 40 Ala. at 389.

Chief Justice Marshall had articulated much the same principle in *McCulloch v. Maryland*. This is an aspect of what has become known as the doctrine of intergovernmental tax immunity. In *McCulloch*, the doctrine found its most ample expression in the famous words of Chief Justice Marshall:

[t]hat the power to tax involves the power to destroy; that the power to destroy may defeat

⁷ Although *Smith v. Short* involved a federal stamp tax on writs issued by Alabama courts, the principle enunciated by the Alabama Supreme Court would seem to be broader.

and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.⁸

McCulloch, 17 U.S. at 431.

The historical basis, and current status, of the constitutional doctrine of intergovernmental tax immunity are set forth in the majority opinion in *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 803. The Court stated:

[a]fter *Graves* [*Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), frequently referred to as the *O'Keefe* case], therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.⁹

⁸ Although this well-known statement has been depreciated (by Justices Holmes, Frankfurter and the second Marshall among others — see *Agricultural Bank v. Tax Comm'n*, 392 U.S. 339, 350-51 (1968), dissent of Marshall, J.), *McCulloch v. Maryland* continues to be relied upon. See e.g., *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989); *North Dakota v. United States*, 495 U.S. 423, 434 (1990).

⁹ See also *McPheeter v. Auburn*, 259 So. 2d at 836, where the Alabama Supreme Court, in assessing the effect of *Graves*, quoted from *McConnell v. City of Columbus*, 173 N.E.2d 760 (Ohio 1961): "[h]owever, since the decision in *Graves v. State of New York*, . . . it no longer can be seriously argued that a nondiscriminatory tax on income earned for services rendered to or work done for a government represents a legally recognizable interference with the activities of that government

Id. at 811. Thus, a fundamental issue before this Court is whether the Jefferson County Tax is "imposed directly on" the federal government.

Graves involved the constitutionality of a state income tax upon the salary received by an employee of the Home Owner's Loan Corporation (HOLC). *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). The income of the Corporation itself had been Congressionally exempted from state taxation. The Court stated that

the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

Id. at 481. Concluding that the state income tax was not a constitutionally impermissible burden, the *Graves* Court pointed out:

1. the tax was non-discriminatory;
2. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their fund;

so as to constitute a tax upon that government." 173 N.E.2d at 762 (citation omitted).

The state of the law in this area was similarly canvassed in *Western Ry. of Alabama v. State*, 3 So. 2d 9 (Ala. 1941), to much the same conclusion. See also Paul J. Hartman, *Federal Limitations on State and Local Taxation* chapter 6 (1981).

3. It is measured by income which becomes the property of the taxpayer when received as compensation for his services;

4. And the tax is laid upon the privilege of receiving income, is paid from the taxpayer's private funds, and not from the funds of the government, either directly or indirectly.

Graves, 306 U.S. at 480.

The Court then held that:

[t]he theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313, 314; *Hale v. State Board*, 302 U.S. 95, 108; *Helvering v. Gerhardt*, *supra*; cf. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 [see particularly pp. 522-26]; *Fox Film Corp. v. Doyal*, 286 U.S. 123 [128]; *James v. Dravo Contracting Co.*, *supra*, 149; *Helvering v. Mountain Producers Corp.*, 303 U.S. 376. . . .

Id., at 480-81.

For purposes of this litigation, the Court believes that there are significant differences between the two cases. The respondent in *Graves* was an employee of an agency created by Congress pursuant to the Commerce power. The Court pointed out that Congress had the power to grant immunity from state taxation with respect to the agencies which it can constitutionally create. *Id.* at 478. The federal judiciary, however, was not created by the Congress, but is co-equal with the Congress itself, and the Executive, by virtue of Articles I, II and III of the Constitution.

The *Graves* Court pointed out that "when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." *Id.* at 477. The nature of the activities conducted determines whether the tax involved is upon the government itself. Here, the tax is on the privilege of performing the federal judicial function itself – one of the three grand (Legislative; Executive; Judicial) federal functions. Although measured by income, the tax here, nevertheless, is imposed upon the function itself, performed by officers of the government. It is not imposed upon the receipt by defendants, as citizens of Alabama, of income indistinguishable from their income received from other sources, as in the case of the employee of the HOLC.

Thus, in *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937) (*Ex rel. Cohn*), one of the cases relied upon in *Graves*, 306 U.S. at 466, the Court had upheld as constitutional a tax by a state upon income received by its resident from rents on land located without the state and interest on bonds, also physically located without the state and secured by mortgages similarly situated. The Court held such a tax:

apportioned to the ability of the taxpayer to pay it, is founded upon the protection by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicile within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by

the receipt of income and represented by the power to control it, bears a direct relationship.

Ex rel. Cohn, 300 U.S. at 313.

Graves, a case involving the income of an employee of a government instrumentality, had been preceded closely in time and in principle by *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). *Dravo*, which had upheld a tax on a government contractor, is regarded as a seminal case in the field of intergovernmental tax immunity. See Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 6.15 at 289-90 (1981). There the Court pointed out:

[t]he tax is not laid upon the Government, its property or officers.

....

The tax is not laid upon an instrumentality of the Government.

.... Respondent is an independent contractor. The tax is non-discriminatory.

The tax is not laid upon the contract of the Government.

James v. Dravo Contracting Co., 302 U.S. at 149 (citations omitted).

The tax in the instant case, by contrast, is laid upon officers of the Government in the very performance of their governmental functions. The *Dravo* Court noted that a "tax upon their [federal instrumentalities'] operations is a direct obstruction to the exercise of Federal powers." *Dravo*, 302 U.S. at 155 (quoting *Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 37 (1873)).

The *Cohn* Court had made it plain that it was holding constitutional a state *income* tax based upon "the receipt and command of income." *Ex rel. Cohn*, 300 U.S. at 314. That rationale subsequently became settled law in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), but is not applicable to the privilege or occupation tax here at issue.

As the *Davis* Court pointed out, 4 U.S.C. § 111 (the Public Salary Act) merely modified the result in *Graves*, observing: "[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretations placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 813. Congress did the same with respect to the *Buck* Act by disclaiming any intent to consent to imposition of a state tax directly upon the U.S. "or any instrumentality thereof." 4 U.S.C. § 107.

The *Davis* Court further stated:

[i]t is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue influence by the others. *Graves*, 306 U.S. at 481; *McCulloch v. Maryland*, 4 Wheat. at 435-436. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary.¹⁰

Davis, 489 U.S. at 814.

¹⁰ If an individual has standing to raise the issue of unconstitutional discrimination, as in *Davis*, such individual has standing to raise any constitutional question with respect to the tax involved as it affects him.

In the case *sub judice*, the Jefferson County occupational tax is imposed directly upon a governmental function – the performance in the federal courthouse in Birmingham, Alabama of federal judicial functions. Those functions are the actual event taxed (the legal incidence of the tax). Thus, in *McPheeter*, the Alabama Supreme Court stated:

[t]he ordinance imposes the tax or license fee in return for the privilege of engaging in a trade, occupation or profession in the City of Auburn and for being afforded the benefit of the facilities of the city while in the pursuit of that business.¹¹

* * *

Imposing payment of the tax or license fee on the individual so engaged and employed places no tax burden on Auburn University, the State or the federal government as such. *The tax is not levied on the employer-employee relationship, but on the taxable event of rendering services or following a trade, business or profession.* The ordinance places the tax on an employee's privilege of working in the city limits of Auburn regardless of the person's employer or the place of residence of the employee.

McPheeter, 259 So. 2d at 835-36 (emphasis added) (citation omitted).

¹¹ It is the government of the United States which receives benefit from the facilities of Jefferson County while its judicial business is being pursued, not the federal judges sitting in the courthouse located in Jefferson County.

The Jefferson County tax, of course, would be paid by individual federal judges, the defendants, out of their own pockets without imposing any monetary (economic) burden upon the Federal Government itself. The economic burden on defendants would be no less if the tax truly were an income tax. But the tax does not purport to, and legally cannot, be based upon the *receipt* by defendants of income from the performance of the functions (which would violate Alabama's constitution), but instead is based squarely upon their performance, as federal judges, of the judicial function (a federal operation) itself. See *McPheeter*, 259 So. 2d at 833.

Neither the Public Salary Act nor the Buck Act could, nor do they purport to, change the actual legal nature, incidence, or the effect, of the tax here involved as established by Alabama's highest court. *McPheeter*, and other Alabama cases on the actual nature and effect of the tax here, are important, and decisive, to the decision of the issues herein. The decisions of the United States Supreme Court on the constitutional issues here involved concern the actual characteristics and effects of the taxes considered, not the labels affixed thereto. If the true, actual incidence of the tax is the *receipt* of income, that is a taxable event within the jurisdiction of the State over its own citizens who receive the income; if, however, the true actual incidence of the tax is the performance of a federal judicial function, that is a taxable event without the jurisdiction of the state. The Alabama decisions establish the latter proposition.

Following the adoption of the XVI Amendment of the United States Constitution, the Government of the United States has jurisdiction over its citizens to tax their receipt

of income; the states probably have always had jurisdiction over their citizens to tax their receipt of income, certainly after *Graves*, 306 U.S. at 466. The proposition that the *receipt* of income by the citizen of a state is a taxable event within the taxing powers of the state found early expression in the dissent of Justice Johnson in *Weston v. Charleston*, 27 U.S. (2 Pet.) 449, 470-72 (1829). In that dissent he interpreted *McCulloch v. Maryland* as banning state and local taxes only when laid directly on the means used by the government in the exercise of its powers; but being of the opinion that the *Weston* tax was imposed on the *receipt* of income from federal securities (and thus, within his understanding of state taxing jurisdiction), he found no constitutional infirmity in the tax. In *McCulloch v. Maryland*, Chief Justice Marshall had declared:

[i]f we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and the property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union. . . .

17 U.S. at 429-30. See Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 6:3 at 243. One hundred and seventy-five years later, after many intervening decisions, and the enactment of various statutes, the view that *receipt* of income, by the individual as citizen of the state,

is a taxable event separate and apart from his activities in earning income in his capacity as officer or employee of the Federal Government, appears to be good law today, as construed by the United States Supreme Court. See *O'Malley v. Woodrough*, 307 U.S. at 277.¹²

Article III, Section 1 of the United States Constitution provides (in part):

[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . .

In the United States's unique federal system, neither a state nor any of its subdivisions can diminish the power or authority of a judge appointed and serving under Article III. In *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318 (1914), the Supreme Court reasserted:

[i]t may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious.

Id. at 328.

¹² Receipt of income may be protected by the anti-diminution clause of Article III, section 1 of the United States Constitution.

The adjudication of litigation in the federal courts is an exertion of the judicial power of the United States, and is an integral function, and an important operation, of the federal government. The federal judiciary is, without question, a "constituent part" of the federal government. Cf. *United States v. Township of Muskegon*, 355 U.S. 484, 486 (1958); *United States v. Boyd*, 378 U.S. 39, 47 (1964). It is an "arm[] of the government deemed by it essential for the performance of governmental functions." *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942). See *Department of Employment v. United States*, 385 U.S. 355, 358-60 (1966) (holding Red Cross to be an instrumentality of the U.S. Government). This tax is, and legally must by Alabama law be, laid *directly* on the performance of that function or operation. *McPheeter*, 259 So. 2d at 835-37. The tax, therefore, is unconstitutional under the contemporary doctrine of intergovernmental tax immunity as set forth in the *Davis* case unless saved by the consent contained in the Public Salary Act and the Buck Act.

The Public Salary Act and the Buck Act are, of course, statutes which have been held to be valid exercises of Congressional power with respect to their subject matter. Their purpose, as expressed in the *Pittsburgh* case, was to waive the "United States' right to constitutional sovereign immunity from state taxation of federal employees' income." *Pittsburgh*, 757 F.2d at 46; *Davis*, 489 U.S. at 812. They were part of the resolution of a dispute, pending for well over a century, whether a tax on the receipt of income or other payment was an indirect tax on the government payor itself and, for that reason protected by intergovernmental tax immunity. *Davis*, 489 U.S. at 812. See generally Paul J. Hartman, *Federal Limitations on*

State and Local Taxation, chapter 6 and Supp. 1992. There has never been any substantial question since the decision in *McCulloch v. Maryland* that a state franchise tax upon a federal instrumentality is prohibited by the Constitution. The prohibition of such a tax is the very essence of the enduring concept of intergovernmental tax immunity. On that point, *McCulloch v. Maryland* is as good law today as it was in 1819. See *supra* note 4 at 7.

Thus, with respect to everything within the reach of Congressional powers, express or implied, the Court must conform to the decisions in *Pittsburgh*, and *Davis*, and hold that, to the extent of its power, Congress has waived the government's immunity from state taxation of the income of its employees. But, just as its is beyond the power of Congress to avoid the anti-diminution provisions of Article III, Sec. 1 of the United States Constitution, *United States v. Will*, 449 U.S. 200 (1980), so too, Congress cannot alter or impair the first class of Article III. Nor can it constitutionally give effective consent to such alteration or impairment by a state. Accordingly, the Court concludes that the tax imposed by Ordinance 1120, by express intention and in real effect, is a franchise tax imposed upon the federal judicial operations and is unconstitutional as a direct tax upon an officer and

instrumentality¹³ of the United States, that is, upon the sovereign itself.

2. Does the tax violate Anti-Diminution Clause of Article III, Section 1 of the United States Constitution?

Article III, Section 1 of the Constitution of the United States provides, in part, that:

[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Ordinance 1120 of 1987, as applied to defendants, would diminish the compensation of Article III judges, at the very least that of those who had entered office prior to the enactment of that ordinance as had defendants. Defendant Clemon was appointed June 30, 1980; Defendant Acker was appointed August 18, 1982.

Prior to *O'Malley v. Woodrough*, 307 U.S. at 277, the Supreme Court had consistently held that even a federal net income tax could not, constitutionally, be imposed upon the salaries of federal judges. *Evans v. Gore*, 253 U.S.

¹³ Surely a federal judge is as integral a part of the United States as an officers club, *United States v. Tax Comm'n of Mississippi*, 412 U.S. at 363; *United States v. Tax Comm'n of Mississippi*, 421 U.S. at 599; a post exchange, *Standard Oil Co. v. Johnson*, 316 U.S. at 485; or the Red Cross, *Department of Employment v. United States*, 385 U.S. at 355. "Officers" are the flesh and blood equivalents of "instrumentalities."

245, 257 (1920) (even the XVI Amendment did not so authorize. See *Evans v. Gore*, (cf. Holmes J., and Brandeis J., dissenting)). And in *O'Malley v. Woodrough*, adopting substantially the reasoning of the Holmes-Brandeis dissent in *Evans v. Gore*, 253 U.S. at 264-66,¹⁴ the Court, overruling *Evans v. Gore*, upheld the federal income tax as constitutional only as to judges of courts of the United States taking office after June 6, 1932. "For it was the Act of June 6, 1932 that gave notice to all judges thereafter to be appointed, of the new congressional policy to include the judicial salaries of such judges in the assessment of [federal] income taxes." *O'Malley v. Woodrough*, 307 U.S. at 279. Justice Frankfurter, in the majority opinion in *O'Malley*, stated:

Congress [by the Revenue Act of 1932] has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the

¹⁴ "I think that the moment the salary is received, whether kept distinct or not, it becomes a part of the general income of the owner. . . . I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond." *Evans v. Gore*, 253 U.S. at 266 (Holmes, J., dissenting). The tax here becomes effective even before the income is earned, and before it is paid, and before it is received.

framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.¹⁵

307 U.S. at 282 (emphasis added). The Court went on to note:

[a]fter this case came here, Congress, by § 3 of the Public Salary Tax Act of 1939, amended § 22(a) [of the Revenue Act of 1932] so as to make it applicable to "judges of courts of the United States who took office on or before June 6, 1932." That section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in *Miles v. Graham*, 268 U.S. 501, latter cannot survive.

Id. at 282-83. Before the amendment effectuated by § 3 of the Public Salary Tax Act, the Revenue Act of 1932 had provided, in § 209:

"[i]n the case of the judges of the Supreme Court, and of the inferior courts of the United

¹⁵ Justice Frankfurter's analysis, with its emphasis on citizenship, echoes that of Chief Justice Marshall. As applied to this case, Alabama (Jefferson County) has full authority to tax, without discrimination, those taxable events which are aspects of defendants' Alabama citizenship and over which it has authority, but not those "conferred by the people of the United States on the government of the Union," the exercise of Article III judicial power.

States created under Article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act."

Id. at 282, n.10.

The explicit holding of the *O'Malley* Court, therefore, was that only judges appointed *after* the Revenue Act of 1932 did not enjoy Article III anti-diminution immunity with respect to the levying of the net income tax imposed thereby. But *O'Malley* approved, and set into the constitutional framework, the proposition "that a non-discriminatory tax laid generally on net income¹⁶ is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III § 1, of the Constitution." *O'Malley*, 307 U.S. at 282. To this extent

¹⁶ Cf. dissent of Justices Douglas and Black (both voting with the majority in *O'Malley*) in *Howard*:

"I have not been able to follow the argument that this tax is an 'income tax' within the meaning of the Buck Act. It is by its terms a 'license fee' levied on the privilege 'of engaging in certain activities.' . . . The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of tax the Kentucky Court of appeals held it to be. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States."

Howard, 344 U.S. at 629 (citation omitted). See also *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), where Justice Douglas, writing for the majority, expressed the same idea in a First Amendment context. "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." *Id.* at 112.

only, as indicated by Justice Frankfurter, the holding in *Miles v. Graham*, 268 U.S. at 509, that "there is no power to tax a judge of the United States on account of the salary prescribed for him by law," was rejected.¹⁷

The legislative definition of "income tax" in 4 U.S.C. § 110(a) is inapposite to the constitutional question before this Court, the answer to which depends upon determining what is the actual legal effect and incidence of the tax. The tax imposed by Ordinance 1120 is *not* an income tax as such is generally understood, nor is it an income tax under Alabama law. *McPheeter*, 259 So. 2d at 834-37; *Estes*, 94 So. 2d at 746-52. That is so because it is not, in fact, a tax upon the *receipt* of income, pay, or compensation, (the taxable event held in *O'Malley* to be constitutionally permissible), but rather, is a license or privilege tax which finds its taxable event, or incidence, in the *performance* of a federal judicial function. Its incidence, thus, is upon the performance of judicial functions by a judicial officer,

¹⁷ See generally Justice Frankfurter's later views as expressed in his dissenting opinion in *City of Detroit v. Murray Corp.*, 355 U.S. 489, 495-505 (1958), where he refers to the "residuum" of continuity in the intergovernmental tax immunity cases, crediting Chief Justice Marshall with establishing the governing principles, including,

" '[t]hat the *attempt* to use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. . . . *Weston v. City Council of Charleston*, 2 Pet. 449, 467 as quoted by Mr. Justice Bradley in *Railroad Co. v. Peniston*, 18 Wall. 5, 38-39 dissenting opinion).' "

City of Detroit, 355 U.S. at 497 (emphasis added.)

antecedent to the point that the salary therefor having been paid by the government becomes the property of the individual citizen of Alabama, mixed with all his other goods and subject to the protection and benefits he receives as a citizen of Alabama.

Although Congress certainly has full power to grant or waive immunity as to officers or instrumentalities created by it, and perhaps even as to itself, and perhaps even beyond the boundaries which the Supreme Court would set were Congress silent, *North Dakota v. United States*, 495 U.S. 423, 439 (1990), it has no power to impair or to waive the anti-diminution clause of Article III, Section 1, as to United States judges appointed and serving thereunder. In *United States v. Will*, 449 U.S. at 228-29, the Supreme Court held that Congress had no power to withdraw a judicial salary increase that had already vested. The *Will* Court stated that: "[a] paramount-indeed, an indispensable-ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches." 49 U.S. at 228.

The tax here in issue constitutes an unconstitutional diminution of defendants' compensation and is invalid as to them. Both defendants were appointed prior to the enactment of Ordinance No. 1120. The enactment of that ordinance constituted no notice to them that their salaries as federal judges would be diminished by the amount of the tax. Their entitlement to the salary prescribed by Congress for federal district judges had vested prior to the enactment of Ordinance 1120. The Court therefore

finds that ordinance unconstitutional as applied to defendants as contrary to Article III, Section 1 of the Constitution of the United States.

The Court should note, however, that were it necessary it would hold that even if the ordinance had been enacted before the defendants' appointments, the tax imposed thereby would nevertheless constitute an unconstitutional diminution of defendants' salaries contrary to Article III, Section 1. It is not a true income tax, but is imposed directly upon an exclusively federal function; it effectively diminishes the compensation which the judge is entitled to receive, rather than taxing an incident of defendants' state citizenship.

Accordingly, the Court GRANTS defendants' motion for summary judgment on the ground that Ordinance 1120 as applied to the defendant judges contravenes Article III of the United States Constitution, as well as the Constitution's Supremacy Clause, Article VI, and DENIES plaintiff's motion for summary judgment. In view of the above ruling, and for the reasons set forth above, the Court does not reach the question whether ordinance 1120 is discriminatory with respect to the source of the pay or compensation taxed.

II. ALL OTHER MOTIONS

In view of the above ruling, the Court DENIES all remaining motions as moot.

CONCLUSION

In sum, the Court; 1) GRANTS defendants' motion for summary judgment; (2) DENIES plaintiff's motion for summary judgment; and 3) DENIES all other motions as MOOT.

The Clerk of Court is DIRECTED to enter final judgment in favor of defendants and against plaintiff and to assess costs against plaintiff.

SO ORDERED, this 31st day of March, 1994.

/s/ Charles A. Moye, Jr.
CHARLES A. MOYE, JR.
UNITED STATES
DISTRICT JUDGE

ATTACHMENT AUNDISPUTED MATERIAL FACTS

1. Alabama Act 406 (1967) authorizes Jefferson County, Alabama, to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay a privilege, license or occupational tax to the state of Alabama.

2. In 1987, the Jefferson County Commission, the governing body of the County, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the County not required by state law to pay a privilege, license or occupational tax to the state.

Sections 2 of Jefferson County Ordinance No. 1120 provides:

[i]t shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the county . . . without paying license fees for the privilege of engaging in or following such vocation, occupation, calling or profession. . . .

Section 1, Definitions, subsection (C), provides:

[t]he words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

3. The effective date of the ordinance was January 1, 1988. The County Occupational Tax is measured at the rate of one-half of one percent (.005) of the gross receipts earned within the geographic boundary of Jefferson County, Alabama.

4. At all times since January 1, 1988, defendants have been employed by the United States of America as District Judges for the Northern District of Alabama pursuant to Article III of the Constitution of the United States.

5. The Northern District of Alabama is composed of 31 counties, including Jefferson County.

6. Defendants maintain their principal offices at the Hugo Black Federal Courthouse in the City of Birmingham, Jefferson County, Alabama.

7. Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama.

8. Ordinance No. 1120, Section 3, provides:

[i]n cases where compensation is earned as a result of work done or services performed both within and without the County, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Since the effective date, neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama, has ever made an oath certifying the alleged amounts of federal judge's salary earned within and without Jefferson County.

9. Defendants are not required by any state law to pay any privilege, license or occupational tax to the state of Alabama. Defendants, however, still pay their dues (one-half of the dues of a licensed practicing attorney) to the Alabama State Bar, which is an integrated bar, and, as such, is an arm or agency of the State of Alabama. Although defendants are not and cannot be licensed to practice law, they remain sustaining or auxiliary members of the bar as they still pay their dues.

10. The Administrative Office of the United States Courts has never withheld County Occupational Tax from any federal judge or court employee pursuant to the provisions of Ordinance No. 1120.

11. All active judges of the Northern District of Alabama except defendants have paid the County Occupational Tax on differing percentages of their judicial salaries to Jefferson County without supporting those percentages by an oath or by any formal accounting procedure. At least one Article III judge (not a defendant) has paid "under protest."

12. All state District and Circuit Court Judges of the Tenth Judicial Circuit of Alabama have paid the County Occupational Tax. The three Alabama Supreme Court Justices with satellite offices in Jefferson County have paid the County Occupational Tax based on portions of their salaries.

13. The Honorable Robert S. Vance, United States Circuit Judge, who served on the Court of Appeals for the Eleventh Circuit, and who, from January 1, 1988 until his death, and his chambers in Jefferson County, Alabama, where he resided and spent most of his time, never paid the County Occupational Tax.

14. Since 1970, the City of Birmingham, Alabama, has imposed an occupational tax at the rate of one percent of gross receipts (twice the rate of the County Tax) on persons engaged in any vocation, occupation, calling or profession within the City.

15. All active judges of the Northern District of Alabama except defendant Acker have paid the City Occupational Tax.

16. Defendant Clemon has paid the City Occupational Tax on approximately 66 percent of his gross earnings during his entire tenure as a United States District Judge.

17. Since 1962, the City of Gadsden, Alabama, where defendant Acker has regularly held court for the last 11 years, has had an occupational tax ordinance similar to the County Occupational Tax, except that it contains no exemptions. The Gadsden ordinance provides in pertinent part:

[i]t shall be unlawful for any person to engage in or follow any trade, occupation or profession, as defined in this article, within the city on and after the first day of February, 1962, without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by two (2) per cent of the gross receipts of each such person.

Gadsden, Alabama Code, Section 7-51.

18. The City of Gadsden has made no effort to exact or to collect a license fee from any of the several Article III judges who, regularly, have sat in the Middle Division of the Northern District of Alabama, which has its courthouse in the City of Gadsden.

19. Defendants have paid their Alabama state income taxes throughout their tenures as federal judges.

20. A final decree entered by defendant Acker as an Article III judge after January 1, 1988, has been formally attacked under Rule 60(b), Fed.R.Civ.P., as having been "unlawfully" entered because said order was entered by defendant Acker when he had not paid his license fee to Jefferson County pursuant to Ordinance No. 1120.

ARTICLE III.

Section 1.

[Judicial Power, Tenure of Office]

The judicial power of the United States, shall be vested in one supreme court[†], and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

ARTICLE VI.

[Debts, Supremacy, Oath]

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States.

§ 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

* * *

§ 110. Same; definitions

As used in sections 105-109 of this title -

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

(July 30, 1947, c. 389, 61 Stat. 645.)

§ 111. Same; taxation affecting Federal employees; income tax

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

§ 5520. Withholding of city or county income or employment taxes

(a) When a city or county ordinance -

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to a designated city or county officer, department, or instrumentality; and

(2) imposes the duty to withhold generally on the payment of compensation earned within the jurisdiction of the city or county in the case of employees whose regular place of employment is within such jurisdiction;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the city or county within 120 days of a request for agreement by the proper city or county official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the city or county ordinance in the case of any employee of the agency who is subject to the tax and (i) whose regular place of Federal employment is within the jurisdiction of the city or county with which the agreement is made or (ii) is a resident of such city or county. The agreement may not apply to pay for service as a member of the Armed Forces (other than service described in section 5517(d) of this title). The agreement may not permit withholding of a city or county tax from the pay of an employee who is not a resident of, or whose regular place of Federal employment is not within, the State in

which that city or county is located unless the employee consents to the withholding.

(b) This section does not give the consent of the United States to the application of an ordinance which imposes more burdensome requirements on the United States than on other employers or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a city or county for services performed in withholding city or county income or employment taxes from the pay of employees of the agency.

(c) For the purpose of this section -

(1) "city" means any unit of general local government which -

(A) is classified as a municipality by the Bureau of the Census, or

(B) is a town or township which, in the determination of the Secretary of the Treasury -

(i) possesses powers and performs functions comparable to those associated with municipalities,

(ii) is closely settled, and

(iii) contains within its boundaries no incorporated places, as defined by the Bureau of the Census,

within the political boundaries of which 500 or more persons are regularly employed by all agencies of the Federal Government;

(2) "county" means any unit of local general government which is classified as a county by the Bureau of the Census and within the political boundaries of which 500 or more persons are regularly employed by all agencies of the Federal Government;

(3) "ordinance" means an ordinance, order, resolution, or similar instrument which is duly adopted and approved by a city or county in accordance with the constitution and statutes of the State in which it is located and which has the force of law within such city or county; and

(4) "agency" means -

- (A) an Executive agency;
 - (B) the judicial branch; and
 - (C) the United States Postal Service.
-

31 CFR § 215.2

* * *

(a) "Agency" means each of the executive agencies and the military departments (as defined in 5 U.S.C. § 105 and 102 respectively) and the United States Postal Service and in addition for city or county withholding purposes only *all elements of the judicial branch.*

* * *

(f) "County income or employment taxes" means *any form of tax* for which, under a county ordinance

(1) Collection is provided by imposing on employers generally the duty of withholding sums from the pay of employees and making return of the sums to a designated county officer, department or instrumentality, and;

(2) The duty to withhold generally is imposed on the payment of compensation earned within the jurisdiction of the County in the case of an employee whose regular place of employment is within such jurisdiction. *Whether the tax is described as an income tax, wage, payroll, earnings, occupational license or otherwise is immaterial.*

Act No. 406 H. 832 - House, Cherner, Waggoner, Holman, Crane, Yeilding, Ellis, Adwell, Gloor, Jackson (T), Money, Bowers

AN ACT

To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

Be It Enacted by the Legislature of Alabama:

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms shall have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business, for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest

municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

Approved September 7, 1967.

Time: 10:37 A.M.

OCCUPATIONAL TAX
of
JEFFERSON COUNTY
ALABAMA

Adopted by Ordinance Number 1120

of Jefferson County Commission

September 29, 1987

DAVID ORANGE, President

Jefferson County Commission

Commissioner of Finance & General Services

REUBEN DAVIS

JIM GUNTER

Commissioner Health &

Commissioner Community

Human Resources

& Economic Development

CHRIS McNAIR

DR. JOHN KATOPODIS

Commissioner

Commissioner Roads &

Environmental Services

Transportation

ORDINANCE NO. 1120

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning

ascribed to them, except where the context clearly indicates or requires a different meaning.

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the work as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52; 53, 54 and 55;

40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received;

but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent ($1/2\%$) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within

and without the county, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum ($1/2\%$) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty (\$50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the county for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at

the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Revenue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees

for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any licensee or supposed licensee, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunity for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this and he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars (\$100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve per centum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten per centum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve per centum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such

person or employer shall be Three Dollars (\$3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due to be

made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

REVENUE AND TAXATION

CHAPTER 12.

LICENSES.

Article I.

General Provisions.

Sec.

- 40-12-1. Change of place of business.
- 40-12-2. Issuance; form of license; levy of county tax; actions for recovery of tax.
- 40-12-3. Collection and distribution where both state and county license tax levied.
- 40-12-4. County license tax for school purposes - Authority to levy.
- 40-12-4.1. County license tax for school purposes - Use of proceeds from taxes levied under Section 40-12-4.
- 40-12-5. County license tax for school purposes - Collection and enforcement.
- 40-12-6. County license tax for school purposes - Administration and collection in accordance with Sections 11-51-180 through 11-51-185.
- 40-12-7. County license tax for school purposes - Disposition of funds collected; charge for collecting.
- 40-12-8. False affidavits or certificates.
- 40-12-9. Penalty for failure to take out license; selling throughout state under one license.
- 40-12-10. License inspectors generally; when taxes due and payable; collection and distribution of penalties and citation fees on delinquent licenses.
- 40-12-11. Bonds of license inspectors.
- 40-12-12. License to designate place of business.

- 40-12-13. Engaging in several businesses.
- 40-12-14. Two or more licenses on same business.
- 40-12-15. License deemed a personal privilege; transferability.
- 40-12-16. Sworn statements of amount of capital, value of goods, stock, etc.
- 40-12-17. Population of municipality as determining tax.
- 40-12-18. Penalty on agents of persons, firms, etc., who have not paid tax.
- 40-12-19. Duty of Department of Finance to prepare forms of licenses.
- 40-12-20. License and stub must correspond.
- 40-12-21. Records to be kept by probate judge.
- 40-12-22. Disposition of moneys by probate judge.
- 40-12-23. Applications for refunds; additional license.
- 40-12-24. Department of Revenue to certify refund; State Comptroller and county commission to draw warrants payable to applicant.
- 40-12-25. License for part of year.
- 40-12-26. Due and delinquent date; term of license.
- 40-12-27. Each day's violation a separate offense.
- 40-12-28. Disposition of proceeds of funds from licenses pertaining to timber or timber products.
- 40-12-29. Additional penalty for failure to comply with Articles 8 and 9 of this chapter.
- 40-12-30. Department of Revenue authorized to promulgate rules and regulations.

Article 2.

Business, Vocation or Occupation.

- 40-12-40. Who must procure state and county licenses.
- 40-12-41. Abstract companies, etc.
- 40-12-42. Acetylene gas and carbide manufacturers.

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- 40-12-43. Actuaries, auditors, and public accountants.
- 40-12-44. Adding machines, calculating machines, comptometers, etc.
- 40-12-45. Advertising.
- 40-12-46. Air-conditioning plants and equipment.
- 40-12-47. Amusement parks.
- 40-12-48. Architects.
- 40-12-49. Attorneys.
- 40-12-50. Auctioneers.
- 40-12-51. Automobile dealers.
- 40-12-52. Repealed.
- 40-12-53. Automobile accessory dealers.
- 40-12-54. Automobile garages and shops.
- 40-12-55. Automobile storage garages.
- 40-12-56. Automobile storage other than in garages.
- 40-12-57. Automobile tire retreading shops.
- 40-12-58. Barbers.
- 40-12-59. Baseball parks.
- 40-12-60. Battery shops.
- 40-12-61. Beauty parlors, etc.
- 40-12-62. Bicycles and motorcycles; dealer tags.
- 40-12-63. Blueprint makers.
- 40-12-64. Bond makers.
- 40-12-65. Bottlers.
- 40-12-66. Bowling alleys.
- 40-12-67. Brokers and agents of iron, railway, etc., supplies.
- 40-12-68. Brooms, brushes, mops, etc.
- 40-12-69. Cereal beverages, carbonated or other soft drinks - Retailers.
- 40-12-70. Cereal beverages, carbonated or other soft drinks - Wholesalers.

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- 40-12-71. Certified public accountants.
- 40-12-72. Cigars, cigarettes, cheroots, etc. - Retailers.
- 40-12-73. Cigars, cigarettes, cheroots, etc. - Wholesalers.
- 40-12-74. Circuses.
- 40-12-75. Cleaning and pressing establishments.
- 40-12-76. Coal and coke dealers - Maintaining yards.
- 40-12-77. Coal and coke dealers - Not maintaining yards.
- 40-12-78. Coffins and caskets - Manufacturers.
- 40-12-79. Coffins and caskets - Dealers and agents.
- 40-12-80. Collection agencies.
- 40-12-81. Commission merchants or merchandise brokers.
- 40-12-82. Concerts, musical entertainments, etc.
- 40-12-83. Conditional sales contracts, drafts, acceptances, etc.; dealers in.
- 40-12-84. Construction companies or contractors.
- 40-12-85. Cotton buyers.
- 40-12-86. Cotton compresses.
- 40-12-87. Cottonseed oil mills, cotton mills, factories, etc.
- 40-12-88. Cotton warehouses.
- 40-12-89. Credit agencies.
- 40-12-90. Creosoting, etc.
- 40-12-91. Delicatessen shops.
- 40-12-92. Dentists.
- 40-12-93. Detective agencies.
- 40-12-94. Developing and printing films.
- 40-12-95. Devices for testing skill and strength used for profit.
- 40-12-96. Directories.

- 40-12-97. Electric refrigerators, electric or gas heaters, etc.
- 40-12-98. Embalmers.
- 40-12-99. Engineers.
- 40-12-100. Fertilizer factories.
- 40-12-101. Fire, closing out, etc., sales.
- 40-12-102. Fireworks.
- 40-12-103. Flying jennies, merry-go-rounds, etc.
- 40-12-104. Fortunetellers, palmists, clairvoyants, etc.
- 40-12-105. Fruit dealers.
- 40-12-106. Gasoline stations and pumps.
- 40-12-107. Glass.
- 40-12-108. Golf, miniature golf, etc., courses.
- 40-12-109. Hat-cleaning establishments.
- 40-12-110. Hide, fur, etc., dealers.
- 40-12-111. Horse show, rodeo, or dog and pony shows.
- 40-12-112. Horse, mule, etc., dealers.
- 40-12-113. Ice cream.
- 40-12-114. Ice factories.
- 40-12-115. Innkeepers and hotels.
- 40-12-116. Junk dealers.
- 40-12-117. Laundered towel, apron, etc., rentals; diaper services.
- 40-12-118. Laundries.
- 40-12-119. Legerdemain and sleight of hand.
- 40-12-120. Lightning rods.
- 40-12-121. Lumber and timber dealers.
- 40-12-122. Lumberyards.
- 40-12-123. Machinery repair shops.
- 40-12-124. Manicurists, hairdressers, etc.
- 40-12-125. Mattresses, cushions, pillows, etc.
- 40-12-126. Medicine, chemistry, bacteriology, etc.

- 40-12-127. Mimeographs, duplicating machines, dictaphones, etc.
- 40-12-128. Mining of iron ore - Levy and amount of tax; limitation of actions.
- 40-12-129. Mining of iron ore - Report of operators.
- 40-12-130. Mining of iron ore - Report of persons receiving products.
- 40-12-131. Monuments and tombstones.
- 40-12-132. Moving picture shows - Transient operators.
- 40-12-133. Moving picture shows - Permanent operators.
- 40-12-134. Newsstands.
- 40-12-135. Oculists, optometrists and opticians.
- 40-12-136. Osteopaths and chiropractors.
- 40-12-137. Packinghouses, cold storage plants, etc.
- 40-12-138. Pawnbrokers.
- 40-12-139. Peddlers and itinerant vendors.
- 40-12-140. Photographers and photograph galleries.
- 40-12-141. Pianos, organs and other musical instruments.
- 40-12-142. Pig iron storage operators.
- 40-12-143. Pistols, revolvers, bowie and dirk knives, etc.
- 40-12-144. Playing cards.
- 40-12-145. Plumbers, steam fitters, tin shop operators, etc.
- 40-12-146. Pool tables.
- 40-12-147. Racetracks, athletic fields, etc.
- 40-12-148. Radios.
- 40-12-149. Real estate brokers and agents - Realty situated within state.
- 40-12-150. Real estate brokers and agents - Realty situated without the state.
- 40-12-151. Restaurants, cafes, cafeterias, etc.

- 40-12-152. Roadhouses, nightclubs, etc.
- 40-12-153. Sandwich shops, barbecue stands, etc.
- 40-12-154. Sawmills, heading mills or stave mills.
- 40-12-155. Scientists, naturopaths, and chiropodists.
- 40-12-156. Sewing machines.
- 40-12-157. Shooting galleries.
- 40-12-158. Shotguns, rifles, ammunition, etc.
- 40-12-159. Skating rinks.
- 40-12-160. Soliciting brokers.
- 40-12-161. Spectacles or eyeglasses.
- 40-12-162. Stock and bond brokers.
- 40-12-163. Street fairs and carnivals.
- 40-12-164. Supply cars.
- 40-12-165. Syrup and sugar factories.
- 40-12-166. Theaters, vaudeville and variety shows.
- 40-12-167. Ticket scalpers.
- 40-12-168. Tourist camps.
- 40-12-169. Tractors, road machinery and trailers.
- 40-12-170. Trading stamps.
- 40-12-171. Transfer of freight.
- 40-12-172. Transient dealers.
- 40-12-173. Transient theatrical and vaudeville shows.
- 40-12-174. Transient vendors and peddlers.
- 40-12-175. Turpentine and resin stills.
- 40-12-176. Vending machines.
- 40-12-177. Veneer mills, planing mills, box factories, etc.
- 40-12-178. Veterinary surgery.
- 40-12-179. Warehouses and yards.
- 40-12-180. Waste grease and animal by-products.

Article 3.**Distributors of Motor Fuels.**

- 40-12-190. Definitions.
- 40-12-191. Required; application.
- 40-12-192. When department may refuse to issue license; appeal.
- 40-12-193. Filing fee.
- 40-12-194. Bond required.
- 40-12-195. Issuance of license; revocation; non-transferability.
- 40-12-196. Engaging in business without license.
- 40-12-197. Reports and payments upon discontinuance or transfer of business.
- 40-12-198. Transportation of gasoline.
- 40-12-199. Transportation of gasoline by boats over navigable waters of state.
- 40-12-200. Delivery of gasoline from tank truck to motor vehicle tank prohibited; exception.
- 40-12-201. Forfeiture of vehicles and boats illegally transporting or delivering gasoline.
- 40-12-202. Rewards; disposition of proceeds of fines.
- 40-12-203. Repealed.
- 40-12-204. Restraining and enjoining violations.
- 40-12-205. Applicability of article to interstate and foreign commerce.
- 40-12-206. Exchange of information with other states.

Article 4.**Leasing or Renting Tangible Personal Property.**

- 40-12-220. Definitions.
- 40-12-221. License required.
- 40-12-222. Levy and amount of tax.

- 40-12-223. Exemptions.
- 40-12-224. Collection of tax.
- 40-12-225. Repealed.
- 40-12-226. Deposit in state treasury.
- 40-12-227. Disposition of proceeds of tax; distribution of enforcement.

Article 5.

Motor Vehicles.

DIVISION 1.

GENERAL PROVISIONS.

- 40-12-240. Definitions.
- 40-12-241. Station wagons, jeeps, etc., classified as passenger automobiles.
- 40-12-242. License taxes and registration fees - Private passenger automobiles and motorcycles.
- 40-12-243. License taxes and registration fees - Exemption of private passenger vehicles of foreign consuls; special plates for such vehicles.
- 40-12-244. License taxes and registration fees - Exemption for disabled veterans, members of national guard or reserves, members of rescue squads and civil air patrol.
- 40-12-245. License taxes and registration fees - Jitney buses.
- 40-12-246. License taxes and registration fees - Motor buses or motor vehicles transporting passengers for hire.
- 40-12-247. License taxes and registration fees - Hearses and ambulances.
- 40-12-248. License taxes and registration fees - Trucks or truck tractors - Generally.

- 40-12-249. License taxes and registration fees - Trucks or truck tractors - Change in gross vehicle weight allowance or in use of vehicle.
- 40-12-250. Tags for motor vehicles owned and used by state, county, municipality or municipal corporation or board.
- 40-12-251. Motor tractors.
- 40-12-252. Basis of tax for truck trailers, tractors trailers and semitrailers.
- 40-12-253. Ad valorem taxation of motor vehicles.
- 40-12-254. Motor vehicles issued to disabled veterans.
- 40-12-255. Manufactured homes - Annual registration fee; identification decal; ad valorem taxes; disbursement; issuance fee; penalties; owner of real estate to provide information to commissioner; gas or electric services entity to provide list; requirements for registration; exemptions; moving of homes.
- 40-12-256. Manufactured homes - Ad valorem taxation - Generally.
- 40-12-257. Citations for noncompliance with Sections 40-12-255 and 40-12-256.
- 40-12-258. Amount of license for part of year; placement of license tags.
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§ 40-12-1. Change of place of business.

When a person has obtained a license to engage in or carry on any business, employment, or profession at any definite place in a county or city in Alabama and desires to remove to any other place within the same county or city where the license was granted and wishes his license altered accordingly, the probate judge who originally issued such license shall make such alteration, which alteration shall be shown on the license records of the probate judge's office; provided, that no license shall be altered to change a place of business to a location requiring a higher license than originally paid. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 830.)

§ 40-12-2. Issuance; form of license; levy of county tax; actions for recovery of tax.

(a) Before any person, firm, or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the State Department of Revenue, as specified, the amount required for such license and shall comply with all the other requirements of this title.

(b) Upon the payment of the amount required for said license and a fee of \$1 herein provided for the issuance of such license and all costs and fees and penalties which shall have accrued, or for which such person,

firm, or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce payment thereof, such probate judge, commissioner of licenses or Department of Revenue shall issue the license properly countersigned, in the form and on the blank to be furnished by the comptroller, which shall set forth and specify the name of the person, firm, or corporation applying therefor, whether the business, profession, or occupation for which the license is procured is owned by an individual, partnership, corporation, or other association, stating the name of the individual, the name of each of the partners if a partnership, the exact name of the corporation or association, if a corporation or association, and the name of each of the principal officer thereof, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same, if such location shall be in a city or town and have a street number and, if not, then the location and amount paid for such license, and the time for which it is issued; and if the license is for a peddler it shall state whether he proposes to travel on foot or on horseback or on wagon or motor vehicle; provided, that the governing body of any county may furnish application blanks in such form that the applicant for a license may supply the above information in writing; and such license shall not be transferable except as otherwise provided herein, nor shall it entitle the holder thereof to carry on any other business or do any other act than that named therein.

(c) Whenever a license is levied in this title, there shall be collected both a state and county license for each

place of business, except as specifically otherwise provided.

(d) In case it should become necessary to remove any business for which a license is required by this section from one location to another location in the same county, and such business is continued as the same kind and character and by the same person or firm as that carried on at the former location, another license shall not be required for such business for the same license year.

(e) There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of Article 2 of this chapter, for state purposes and which are payable to the judge of probate or commissioner of licenses, a sum equal to 50 percent of the amount levied for state purposes, except as otherwise specifically provided.

(f) Any action to recover the amount due for any license, whether levied solely for state purposes or for state and county purposes, shall be instituted by the State of Alabama and may include all penalties and fees due by any person, in addition to the amount due for such license and interest thereon. The amount recovered in any such actions shall be paid to the State Department of Revenue, and if any portion of said license was levied for county purposes, such portion shall be remitted to the county in which such license was payable, and the department may from the amount of any penalties or fee thus recovered remit the amount, if any, due to the judge of probate, commissioner of licenses, or license inspector. (Acts 1935, No. 194, p. 256; Acts 1939, No. 18, p. 16; Code

1940, T. 51, § 831; Acts 1943, No. 546, p. 535; Acts 1951, No. 700, p. 1208; Acts 1984, No. 84-446, p. 1040, § 7.)

§ 40-12-9. Penalty for failure to take out license; selling throughout state under one license.

(a) It shall be unlawful for any person, firm, or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this title provided. Any person who is convicted of failing to take out and pay for the license required shall be fined not less than the amounts of all licenses required of him and, if convicted for refusing to take out the license shall, on conviction, be fined not less than the amount of the state and county license due by him and not more than \$100 in addition thereto, and may be sentenced to hard labor for the county for not more than six months, all fines to be paid in money; and, when collected, two thirds shall be paid to the state and one third to the county.

(b) No person shall be allowed the privilege of selling throughout the state under one license except by special provisions of law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 834.)

§ 40-12-11. Bonds of license inspectors.

Before entering upon the duties of their office, all license inspectors shall execute to the State of Alabama a bond, to be approved by the Governor, in amounts to be fixed by the Department of Revenue, for the faithful performance of their duties. (Acts 1943, No. 122, p. 123; Acts 1961, Ex. Sess., No. 208, p. 2190.)

§ 40-12-12. License to designate place of business.

Every license granting authority to engage in or exercise any business, employment, or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment, or profession at some specified house or other definite place within the county of the probate judge granting it. Engaging in or exercising any such license, business, employment, or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment, or profession is limited thereto by law shall be void. (Acts. 1935, No. 194, p. 256; Code 1940, T. 51, § 836.)

§ 40-12-13. Engaging in several businesses.

Where any person, firm, or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 838.)

§ 40-12-14. Two or more licenses on same business.

Wherever in this title two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor. (Acts. 1935, No. 194, p. 256; Code 1940, T. 51, § 839.)

§ 40-12-15. License deemed a personal privilege; transferability.

(a) Every license shall be held to confer a personal privilege to transact the business, employment, or profession which may be the subject of the license and shall not be exercised except by the person, firm, or corporation licensed, unless specifically authorized by law to do so.

(b) When a business or privilege for which such license is issued is, under actual sale, transferred to a new ownership, a transfer of license may be effected by application to the probate judge originally issuing such license and the payment of a fee of \$1. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 840; Acts 1984, No. 84-446, p. 1040, § 7.)

§ 40-12-40. Who must procure state and county licenses.

Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling, or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 450.)

§ 40-12-43. Actuaries, auditors, and public accountants.

Each professional actuary, auditor, or public accountant shall pay a license tax of \$25 to the state, but no

license tax shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person above named is engaged, each person so engaged shall pay a license tax of \$25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51 § 453.)

§ 40-12-44. Adding machines, calculating machines, comptometers, etc.

Each person engaged in the business of selling adding machines, calculating machines, comptometers, billing machines, bookkeeping machines, cash registers, typewriters, or similar machines shall pay the following annual privilege tax: in counties of over 100,000 inhabitants, \$100; in counties of over 60,000 inhabitants and not over 100,000 inhabitants, \$60; in counties of over 40,000 inhabitants and not over 60,000 inhabitants, \$40; in counties of 40,000 inhabitants or less, \$25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51 § 454.)

§ 40-12-45. Advertising

All bill posting and advertising companies displaying advertisements in public places, including streetcars, and each person engaged in the business of advertising or bill posting shall pay the following license taxes: in counties having 200,000 inhabitants or over, \$150; in

counties of less than 200,000 inhabitants and as many as 100,000 inhabitants, \$125; in counties of less than 100,000 inhabitants and as many as 75,000 inhabitants, \$100; in counties of less than 75,000 inhabitants and as many as 50,000 inhabitants, \$50; in counties of less than 50,000 inhabitants and as many as 30,000 inhabitants, \$25; in counties of less than 30,000 inhabitants, \$15. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 456.)

* * *

§ 40-12-48. Architects.

Each architect practicing his profession for the public shall pay to the state a license tax of \$25, but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person above named is engaged, each person so engaged shall pay the amount provided above. (Acts 1935, No. 194, p. 256; Code 1940, T. 51 § 459.)

§ 40-12-49. Attorneys.

(a) Each attorney engaged in the practice of law shall pay an annual license tax to the state, but none to the county. On October 1, 1992, the license tax shall be \$200, and on October 1, 1993, and each year thereafter,

the annual license tax shall be \$250. If business is conducted as a firm or as a corporation in which more than one lawyer is engaged, each lawyer shall pay such license tax, but no lawyer shall be required to pay a license tax until the first day of October following admission to the bar. The license tax shall be paid to the Secretary of the Board of Bar Commissioners of the Alabama State Bar. The funds collected for the issuance of the license tax levied shall constitute a separate fund to be disbursed on the order of the Board of Commissioners of the Alabama State Bar. As soon after the first day of each November as practicable, the Secretary of the Alabama State Bar shall certify to the presiding judge of the circuit court having jurisdiction in the county the names of attorneys who have paid the license fee.

(b) The license taxes shall be due and payable on October 1 of each year and shall be delinquent on the following November 1. If a license is delinquent, the Secretary of the Board of Bar Commissioners of the Alabama State bar shall assess and collect a penalty of 15 percent of the amount of the license. The penalty shall be paid when the license is issued.

(c) Section 40-12-10, relating to the collection and distribution of business license taxes shall not be applicable to license taxes provided in subsection (a). ((Acts 1935, No. 194, p. 256; Acts 1939, No. 551, p. 871; Code 1940, T. 51, § 460; Acts 1951, No. 186, p. 437; Acts 1959, No. 156, p. 682; Acts 1966, Ex. Sess., No. 287, p. 430; Acts 1971, No. 958, p. 1716; Acts 1979, Ex. Sess., No. 79k-27, p.

37; Acts 1985, 1st Ex. Sess., No. 85-119; Acts 1992, No. 92-600, p. 1246, § 1.)

§ 40-12-50. Auctioneers.

Auctioneers and apprentice auctioneers shall pay annual license taxes in accordance with Chapter 4 of Title 34.

§ 40-12-70. Cereal beverages, carbonated or other soft drinks - Wholesalers.

Each person engaged in the business of selling at wholesale nonalcoholic, carbonated, or other soft drinks shall pay an annual license tax of \$50; provided, that bottlers who have taken out the bottle license for operating plants in this state shall not be liable under this section, nor shall such bottlers be liable for any county or state license under Section 40-12-174, nor as transient vendors or dealers or peddlers. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 483.)

§ 40-12-71. Certified public accountants.

(a) In lieu of any other privilege license fees levied under the revenue laws of the State of Alabama, each person who holds a certificate as a certified public accountant and who is a resident of the State of Alabama and who is engaged in the practice of public accounting in the State of Alabama shall pay an annual license fee of \$25, but no license fee shall be paid to the county. Such license shall be obtained from the probate judge or licensing agency in the county where the business of a certified public accountant is located and shall be due and delinquent as provided by Section 40-12-26. All money paid into the treasury for license under this section shall be deposited in the State Treasury to the credit of the Alabama State Board of Public Accountancy and shall constitute a separate fund to be disbursed as provided in subsection (b) of this section.

(b) The fund provided by subsection(a) of this section shall be used by the Alabama State Board of Public Accountancy to defray the expenses for administering and enforcing the laws of the State of Alabama pertaining to the practice of public accounting and the other necessary purposes and expenses of said board not otherwise available and provided pursuant to Section 34-1-3; and the said Alabama State Board of Public Accountancy shall have the power to direct the disbursement of said fund, which shall be paid on the warranty of the State Comptroller upon certificate or voucher of the secretary of said board, approved by the chairman or vice-chairman of said board. No funds shall be withdrawn or expended

except as budgeted and allotted according to the provisions of Article 4 of Chapter 4 of Title 41, and only in amounts as stipulated in the general appropriations bill.

(c) No license fee as herein provided shall be due or payable by any certified public accountant employed by any state or federal government agency, educational institution, or industry, who does not perform public accounting service for which he is paid. (Acts 1969, No. 269, p. 599, §§ 1-3.)

§ 40-12-72. Cigars, cigarettes, cheroots, etc. - Retailers.

Each retail dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, or snuff, or any substitute therefor, either or all, shall pay to the state the following privilege license tax: in cities of 25,000 inhabitants and over, \$15; in cities or towns of 10,000 inhabitants and less than 25,000 inhabitants, \$10; in cities or towns of 5,000 inhabitants and less than 10,000 inhabitants, \$5; in cities or towns of 2,000 inhabitants and less than 5,000 inhabitants, \$3; in all other places, whether incorporated or not, \$2. This privilege license tax is levied on each place of business owned or operated by retail dealers, whether under the same roof or not. The phrase "retail dealer" as used in this section shall include every person, firm, corporation, club, or association, other than a wholesale dealer as defined in Section 40-12-73, who shall sell or store or offer for sale any one or more of the articles enumerated herein, irrespective of quantity or

amount, or the number of sales. The privilege license tax herein defined shall be in addition to the sales tax as provided in Section 40-25-2. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 484.)

§ 40-12-73. Cigars, cigarettes, cheroots, etc. - Wholesalers.

Each wholesale dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff, or any substitute therefor, either or all, shall pay one privilege license tax to the state of \$100 and \$5 to each county in which such wholesale dealer does business. The phrase "wholesale dealer" as used in this section shall include persons, firms, corporations, clubs, or associations who shall sell or store or offer to sell any one or more of the articles enumerated herein to retail dealers for the purpose of resale only. The privilege license tax herein levied shall be in addition to the sales tax as provided in Section 40-25-2. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 485.)

§ 40-12-95. Devices for testing skill and strength used for profit.

For each device used by persons as a source of profit to themselves, such as throwing at wooden figures or any object of like character, striking at an object to test the strength, blowing to test the lungs, or other devices of like character, or for operating a cane rack, a knife rack, or similar rack or table, there shall be paid a license tax of \$25, in each county in which it is operated, but this section shall not be construed to legalize the operation of any device which is now prohibited by law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 507.)

§ 40-12-96. Directories.

Each person compiling, selling, or offering for sale directories shall pay to the state license taxes as follows: for each city or town of 100,000 inhabitants or over, \$150; in cities or towns of 50,000 and less than 100,000 inhabitants, \$75; in cities or towns of 20,000 and less than 50,000 inhabitants, \$50; in cities and towns of less than 20,000 inhabitants, \$15; provided, that this section shall not apply to directories issued by any person in connection with or as a part of a business for which a general license tax is provided. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 509.)

§ 40-12-97. Electric refrigerators, electric or gas heaters, etc.

For each dealer in electric, gas, or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, or for each electrical or gas repair shop, or electrical or gas supply shop there shall be paid a license tax as follows: in cities of 100,000 inhabitants or over, \$30; in cities of 50,000 and less than 100,000 inhabitants, \$20; in cities of 10,000 and less than 50,000 inhabitants, \$10; and in places of less than 10,000 inhabitants, whether incorporated or not, \$5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 511.)

§ 40-12-98. Embalmers.

Each embalmer shall pay an annual license tax of \$10. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 512.)

§ 40-12-99. Engineers.

Each person practicing for the public the profession of civil, electrical, mining, mechanical, or radio engineering shall pay an annual license tax of \$20 to the state, but no license shall be paid to the county. If such business is conducted as a firm or corporation in which more than one engineer is engaged, each engineer so engaged shall

pay a license tax of \$20. No such engineer shall be required to pay this license tax until after he has practiced his profession for two years in this state or elsewhere. An engineer who is an employee of the state or of any county or municipality at a fixed salary and who engages in no other engineering work for compensation is not subject to this license tax when so employed. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 522.)

§ 40-12-100. Fertilizer factories.

Each person owning or operating any fertilizer factory shall pay a license tax as follows: in which the capital invested does not exceed \$25,000, \$50; in which the capital invested exceeds \$25,000 and does not exceed \$50,000, \$100; in which the capital invested exceeds \$50,000 and does not exceed \$100,000, \$200; in which the capital invested exceeds \$100,000, \$250 for each factory. Each fertilizer mixing plant shall pay a license tax of \$15. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 524.)

§ 40-12-101. Fire, closing out, etc., sales.

Each person, other than the original bona fide owners, selling goods, wares, or merchandise as an insurance, bankruptcy, mortgage, insolvent, assignee's, executor's, administrator's, receiver's, trustee's, removal, or

closing out sale, or a sale of goods, wares, and merchandise damages by fire, smoke, water, or otherwise, shall pay license tax of \$100. The provisions of this section shall not apply to sheriffs, constables, or other public or court officers or to any other persons acting under the license, discretion, or authority of any court, state or federal, selling goods, wares, or merchandise in the course of their official duties. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 525.)

§ 40-12-124. Manicurists, hairdressers, etc.

Each person engaging in the business of manicuring, hairdressing or administering facial treatments shall pay a license tax of \$5; provided, that this section shall not apply to such persons employed in beauty shops and beauty shop colleges, paying the license tax as provided under Section 40-12-61. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 549.)

§ 40-12-125. Mattresses, cushions, pillows, etc.

Each person engaging in the business of manufacturing or upholstering cushions, mattresses, pillows, or rugs, or the renovating, cleaning or reworking of same, shall pay for the privilege of engaging in such business, \$15;

provided that the license tax shall be \$5 in towns of 3,000 or less population. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 551.)

§ 40-12-126. Medicine, chemistry, bacteriology, etc.

Each person engaged in the practice of medicine, chemistry, bacteriology, roentgenology, or other similar profession, except chemists, bacteriologists, and roentgenologists employed full time by physicians, non-profit scientific institutions, and hospitals, and except doctors employed exclusively by a medical college, shall pay the following annual license tax: in cities or towns of over 5,000 inhabitants, \$25; 1,000 to 5,000 inhabitants, \$10; all other places, whether incorporated or not, \$5, but no license tax shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license tax as above stated. The license tax imposed by this section shall not apply until such person shall have practiced his or her profession as long as two years. Two fifths of the annual license tax herein levied shall remain in the treasury and shall constitute a separate fund to be disbursed by the treasurer as follows: All of such fund arising from licenses paid in each of the separate counties of the state shall be set aside in a separate fund for such county and shall be disbursed by the treasurer, on the order of the board of censors of the

medical society of such county, if there is such organization in such county. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 181, p. 210; Code 1940, T. 51, § 552; Acts 1957, No. 379, p. 508.)

§ 40-12-161. Spectacles or eyeglasses.

Each person selling spectacles or eyeglasses, other than nonprescription sunglasses, shall pay the following license tax: in cities or towns of 50,000 inhabitants and over, \$25; in cities or towns of 15,000 inhabitants and less than 50,000 inhabitants, \$15; in cities and towns of over 5,000 inhabitants and less than 15,000 inhabitants, \$10; and in all other places, whether incorporated or not, \$5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 594.)

§ 40-12-162. Stock and bond brokers.

Each person dealing in stocks and bonds shall pay a license tax of \$50. The payment of the license tax required by this section shall authorize the doing of business in the town, city or county where paid. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 596.)

§ 40-12-163. Street fairs and carnivals.

Each person operating or conducting an exhibition termed a "street fair" or "carnival" shall pay to the state a license tax as follows: for an exhibition operating or composed of or controlling or embracing not more than 10 exhibits, devices or concessions, \$50; but where more than 10 and not exceeding 20 exhibits, devices or concessions, \$75; and where more than 20 and not exceeding 35, \$100; and where more than 35 exhibits, devices or concessions, \$150. This license shall entitle the street fair or carnival to be operated for a period of not exceeding two weeks in any one place at any one time. For the purpose of this section a "street fair" or "carnival" shall mean a combination of exhibitions, also called sideshows, rides, games of chance, tests of skill or strength, concessions and any other devices generally associated with a "street fair" or "carnival," regardless of ownership, when operated as a combination or a group, and regardless of whether or not an admission is charged to the midway or grounds. A licensee under this section shall not be required to purchase licenses under the provisions of Sections 40-12-69, 40-12-95, 40-12-103, 40-12-140, 40-12-153 and 40-12-157. (Acts 1935, No. 194, p. 256; Acts 1939, No. 391, p. 515; Code 1940, T. 51, § 597; Acts 1967, No. 422, p. 1088.)

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-896

JEFFERSON COUNTY, ALABAMA, PETITIONER

v.

WILLIAM ACKER AND U.W. CLEMON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1-56) is reported at 92 F.3d 1561. The panel opinion of the court of appeals is reported at 61 F.3d 848. The opinion of the district court (Pet. Supp. App. 1-35) is reported at 850 F. Supp. 1536.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The applicable provisions of Articles III and VI of the Constitution of the United States, of 4 U.S.C. 106, 110-111,

and of the Jefferson County, Alabama, occupational tax (Ordinance No. 1120, Sept. 29, 1987), are set forth at Pet. App. 57-114.

STATEMENT

1. In 1967, the State of Alabama authorized its counties to impose "a license or privilege tax upon any person" who engages in a business or profession within the county and who is not required by any other law to pay such a tax to the county or the State (1967 Ala. Acts No. 406, § 4; Pet. App. 66-68; see Pet. Supp. App. 31). Pursuant to this authority, the Jefferson County Commission enacted the "Occupational Tax of Jefferson County, Alabama" in 1987 (Jeff. Cty. Ord. 1120 (Sept. 29, 1987); Pet. App. 69; see Pet. Supp. App. 31). Section 2 of this Ordinance states that it (Pet. App. 72):

shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession * * * within the County * * * without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

The term "gross receipts" is defined by the Ordinance to include (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71):

the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given

credit for by his employer for any work done or personal services rendered * * * .

The term "gross receipts" does not include any compensation earned outside Jefferson County (Jeff. Cty. Ord. 1120, § 3; Pet. App. 72-73).

Jefferson County ordinarily collects its "occupational" tax from employers, who withhold the tax from employee wages. In the absence of withholding, however, employees are to remit the taxes directly to the County (Jeff. Cty. Ord. 1120, §§ 4, 5; Pet. App. 73-75). Persons who fail to comply with the Ordinance are subject to interest and penalties on the unpaid balance of the taxes (Jeff. Cty. Ord. 1120, § 10; Pet. App. 77-78). There are no criminal penalties for failing to pay the county's "occupational" tax (Pet. App. 26).

2. Respondents are federal district judges for the Northern District of Alabama. Most, but not all, of their duties as federal judges are performed at the federal courthouse located in Jefferson County. Pet. Supp. App. 32-33.

The State of Alabama has not directly imposed a "privilege, license or occupational" tax on the employment conducted by respondents. Pet. Supp. App. 33. The Jefferson County ordinance therefore applies to respondents and obligates them to pay an "occupational" tax of one-half of one percent of their "gross receipts" from the services they perform within the County (Jeff. Cty. Ord. 1120, § 2; Pet. App. 72). The Administrative Office of the United States Courts has not withheld the county taxes from respondents' wages (Pet. Supp. App. 33), and respondents have not paid the taxes directly (*Id.* at 34).

3. a. The County brought suit against respondents in the state district court of Jefferson County to collect the unpaid taxes (Pet. Supp. App. 1). Relying upon 28 U.S.C. 1442, respondents removed the action to the United States District Court for the Northern District of Alabama. That statute authorizes the removal to federal court of any civil or criminal proceeding commenced in a state court against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties" (28 U.S.C. 1442(a)(3)).

b. On cross motions for summary judgment, the district court held the county "occupational" tax to be unconstitutional as applied to federal judges (Pet. Supp. App. 1-31). The court reasoned that, even though the tax was calculated by reference to the income earned by respondents and was not imposed on the United States, the tax directly interfered with the operations of the federal judiciary and therefore violated the "intergovernmental tax immunity doctrine" derived from the Supremacy Clause of Article VI of the Constitution (Pet. Supp. App. 10-22). The court further concluded that application of the county tax to respondents would effect a reduction in their compensation in violation of the Compensation Clause of Article III of the Constitution (Pet. Supp. App. 24-30).

4. A panel of the court of appeals reversed. 61 F.3d 848 (1995). The panel noted that the county tax (i) applies to all forms of employment and does not discriminate against federal judges (*id.* at 852-853) and (ii) is not imposed on the federal government directly (*id.* at 853-856). The panel concluded that the county tax is constitutional because, both in operation and effect, it

merely taxes the income that respondents derive from employment (*id.* at 855):

[O]nly if a federal employee is compensated [does] he or she become[] liable to Jefferson County for the occupational tax. A federal employee in Jefferson County could refuse to pay any license fees and still lawfully perform his or her federal duties under the ordinance so long as that employee received no income from performing those duties. Consequently, the occupational tax is not a *precondition* to the performance of any federal government functions but a *consequence* of receiving any compensation therefor.

Because the county has simply imposed a nondiscriminatory "income tax" on respondents (*id.* at 856), the panel concluded that the tax does not violate the intergovernmental tax immunity doctrine and does not unconstitutionally diminish respondents' compensation (*id.* at 856-857).

5. a. On rehearing *en banc*, the court of appeals vacated the panel decision and affirmed the district court (Pet. App. 1-36), with three judges dissenting (*id.* at 37-49). The court of appeals acknowledged that, under this Court's decision in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), if the county tax were merely an "income tax" on federal employees, it would not violate the doctrine of intergovernmental tax immunity (Pet. App. 19). The court further recognized that it is a question of federal law whether the county tax is, in substance, an "income tax" for this purpose. The court nonetheless concluded that it would look to state law to

determine "the attributes comprising the substance" of the county tax (*ibid.*).

The court noted that, in *McPheeter v. City of Auburn*, 259 So. 2d 8333 (1972), the Alabama Supreme Court stated that a local occupational tax constitutes a license or "privilege" tax – rather than an income tax – under state law (Pet. App. 19-20). Based upon the theory that the county tax is imposed on the "privilege" of performing the federal judicial function, rather than on the "income" of federal judges, the court of appeals held that the tax violates the doctrine of intergovernmental tax immunity (*id.* at 20-22):

The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Although the court acknowledged that the "legal incidence" of the county tax falls on respondents as individuals, the court concluded that the actual incidence of the tax is on the "privilege" of performing judicial duties (*id.* at 22-23). The court stated that federal judges are "federal instrumentalities" in their performance of judicial duties and that the county tax thus "amounts to a direct tax on federal instrumentalities in violation of the intergovernmental tax immunity doctrine" (*id.* at 25).

b. The court of appeals then considered whether Congress has consented to the imposition of such taxes. The court held that the Public Salary Tax Act – in which

Congress consented to taxation of the "pay or compensation" of federal officers or employees (4 U.S.C. 111) - does not consent to imposition of a "privilege" tax on federal judges (Pet. App. 29-31). The court distinguished *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (1985), in which the Third Circuit held that a local "privilege" tax was, in substance, an "income tax" that could be imposed under the Public Salary Tax Act on the official transcript fees received by a federal court reporter (Pet. App. 31 n.19). The court of appeals stated, without elaboration, that the ordinance involved in *City of Pittsburgh* "did not include the factors" that made the Jefferson County ordinance a "privilege" tax (*ibid.*).

The court of appeals also held that the Buck Act does not consent to the imposition of a "privilege" tax on federal judges (Pet. App. 32-36). That statute provides that "[n]o person" is to be relieved of liability for a state or local "income tax * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area" (4 U.S.C. 106(a)). The statute defines the term "income tax" to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c). The court of appeals acknowledged that the county tax was "within the Buck Act's definition of an 'income tax'" (Pet. App. 33). The court stated, however, that the Jefferson County tax on the "privilege" of working as a federal judge is a direct tax on "the United States or an[] instrumentality thereof" (4 U.S.C. 107(a)) and is therefore prohibited by the express terms of the Act (Pet. App. 33).

In reaching this conclusion, the court of appeals sought to distinguish this Court's decision in *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624 (1953). In *Howard*, the Court held that the Buck Act authorized application of a Louisville tax on the "privilege" of conducting business to persons who were employed at a naval ordnance plant located within the city. *Id.* at 627-629. The court of appeals stated that the sole question in *Howard* was whether "Louisville lacked jurisdiction to tax in a federal area" (Pet. App. 35). By contrast, the court stated, the issue in this case is whether the local tax is a direct tax on a federal instrumentality that violates the intergovernmental immunity of the United States (*ibid.*). The court stated that the fact "that *Howard* upheld the application of the Louisville license fee to federal employees does not imply that the Buck Act precludes an intergovernmental tax immunity challenge to the application of Ordinance No. 1120 to federal judges" (*id.* at 36). The court explained that (*ibid.*):

Unlike federal judges, employees of a naval ordnance plant realistically can be viewed as separate entities from the federal government when performing their duties * * * .

c. Because the court of appeals concluded that the challenged tax violated the intergovernmental tax immunity of the United States, and was not authorized by the Public Salary Tax Act or the Buck Act, the court stated that it was unnecessary to address whether the tax also violated the Compensation Clause of Article III of the Constitution (Pet. App. 10).

DISCUSSION

The court of appeals erred in concluding that the county tax is unconstitutional as applied to federal judges. Congress has consented to the imposition of state and local taxes assessed upon the "pay or compensation" received by federal officers and employees. 4 U.S.C. 111. The fact that such a tax may be labelled a "privilege" tax under state law does not vitiate that consent. Review by this Court is warranted both by the importance of the question presented and because the decision in this case conflicts with the reasoning and conclusion of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985).

1. Neither the parties nor the courts below addressed whether this state court tax collection suit was properly removed to federal court. 28 U.S.C. 1442(a)(3) authorizes the removal to federal district court of any "civil action * * * commenced in a State court" against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties" (*ibid.*; emphasis added). The statute permits a federal judge to remove a case commenced against him in state court if a federal defense is pleaded to the state claim (*Mesa v. California*, 489 U.S. 121, 136 (1989)) and if the state claim is "for any act under color of office or in the performance of his duties" (28 U.S.C. 1442(a)(3)). The first of these two requirements is plainly met in this case. The second, however, is not clearly established, for the courts below have not addressed whether the state court action was commenced against respondents "for any act under

color of office or in the performance of [their] duties" (*ibid.*).¹

Because the parties did not address this question in the courts below, it is unclear what contentions they would raise. If the petition for a writ of certiorari is granted, the Court may wish to direct the parties to address this jurisdictional question in their briefs on the merits of the case.²

2. The court of appeals erred in concluding that Congress has not consented to the challenged county tax.³ The Public Salary Tax Act unequivocally provides

¹ Although the county tax is calculated upon the *income* that respondents receive for the performance of their duties, it is not clear that respondents' refusal to pay the tax was an act under color of office or in the performance of duty.

² "If at any time before final judgment [in a case removed to federal court] it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. 1447(c).

³ The court of appeals did not consider whether congress has consented to the tax under the Public Salary Tax Act (4 U.S.C. 111) or the Buck Act (4 U.S.C. 105 *et seq.*) until *after* the court had concluded that the tax violated the constitutional doctrine of intergovernmental tax immunity. As this Court has frequently observed, however, a constitutional issue should be reached only after non-constitutional bases for decision have been resolved. *Califano v. Yamasaki*, 442 U.S. 682, 692-693 (1979); *Bowen v. United States*, 422 U.S. 916, 920 (1975); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960). This practice is rooted in the Court's reluctance to decide "abstract, hypothetical or contingent" constitutional questions. *Thorpe v. Housing Authority*, 393 U.S. 268, 284 (1969). It is appropriate first to address whether Congress has consented to the challenged tax because, if such consent has been given, it is irrelevant whether,

that "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. 111. The history and the text of this provision reflect that a nondiscriminatory local tax imposed on compensation from employment may be applied to any "officer or employee of the United States" (*ibid.*) without regard to whether that tax is labelled, under state law, as an "occupation" tax, a "privilege" tax, or an "income" tax.

a. The Public Salary Tax Act is intimately connected with the modern development of the inter-governmental tax immunity doctrine. See *Davis v. Michigan Department of the Treasury*, 489 U.S. 803, 811-812 (1989). Under this doctrine, "States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." *United States v. County of Fresno*, 429 U.S. 452, 459 (1977) (footnote omitted). For many years, the intergovernmental tax immunity doctrine was broadly applied to prohibit state taxation of the salaries of officers and employees of the United States (*Dobbins v. Commissioners*, 41 U.S. (16 Pet.) 435 (1842)) and to prohibit federal taxation of the salaries of state officials (*Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870)). See *Davis v. Michigan Department of the Treasury*, 489 U.S. at 810-812. In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), however, the Court declined to follow

in the absence of such consent, the tax would be unconstitutional.

these authorities – and implicitly overruled *Collector v. Day* – by holding that the federal income tax could validly be imposed on employees of the New York Port Authority. One year later, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939), the Court overruled the entire line of cases from *Dobbins v. Commissioner* through *Collector v. Day*. As this Court explained in *Davis v. Michigan Department of the Treasury*, 489 U.S. at 811:

After *Graves*, * * * intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.

The Public Salary Tax Act was considered by Congress during the period when the Court was in the process of narrowing, and ultimately abandoning, the *Dobbins-Day* line of cases. After the Court held in 1938 in *Helvering v. Gerhardt*, *supra*, that the federal government could impose nondiscriminatory taxes on state employees, Congress determined that federal officers and employees should be subject to similar state taxes. In the Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575, the predecessor to 4 U.S.C. 111, Congress therefore expressly consented to nondiscriminatory state taxation of the "pay or compensation" of federal officers and employees. See H.R. Rep. No. 26, 76th Cong., 1st Sess. (1939); S. Rep. No. 112, 76th Cong., 1st Sess. (1939).

Shortly before the Public Salary Tax Act was enacted, however, this Court entered its decision in *Graves v. New York ex rel. O'Keefe*, *supra*. The practical effect of the Public Salary Tax Act was thus to codify the intervening result

in *Graves* and thereby foreclose "the possibility that subsequent judicial reconsideration of [*Graves*] might reestablish the broader interpretation of the immunity doctrine." *Davis v. Michigan Department of the Treasury*, 489 U.S. at 812. The purpose of the Act is thus plainly to abandon, not preserve or extend, the immunity of federal officers and employees from nondiscriminatory state taxation.

b. The proper interpretation of the Public Salary Tax Act must, of course, begin with its language. See, e.g., *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). Under this Act, the United States consents to nondiscriminatory state or local taxation of the "pay or compensation for personal service" received by any "officer or employee of the United States" (4 U.S.C. 111). Because the local ordinance challenged in this case taxes the "pay of compensation" that respondents receive for the "personal service" they provide as officers of the United States, and does not discriminate in doing so, the tax comes within the plain language of the consent that Congress has given to state and local taxation.⁴

The language of the county ordinance, of course, does more than simply impose the tax. It also states that it is "unlawful for any person" to be employed within the

⁴ The district court (Pet. Supp. App. 8-9) correctly held that the county tax does not "discriminate against the officer or employee because of the source of the pay or compensation" (4 U.S.C. 111). The *en banc* court of appeals stated that, "[o]n this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it" (Pet. App. 9 n.9).

County "without paying" the tax (Jeff. Cty. Ord. 1120, § 2; Pet. App. 72).⁵ The court of appeals held that the tax is beyond the scope of the statutory consent because, (i) under state law, the ordinance imposes a tax on the "privilege" of working, rather than a tax on the "income" received from work (Pet. App. 29-31; see *id.* at 19-20, citing *McPheeter v. City of Auburn*, 259 So. 2d 833 (Ala. 1972)) and (ii) a tax imposed on the "privilege" of working as a federal judge constitutes a direct tax on the United States to which Congress has not consented (Pet. App. 31).

The court of appeals erred, however, in looking to the label, rather than the substance, of the challenged tax. Whether the County's occupational tax is imposed on "pay or compensation" within the scope of the consent granted by the Public Salary Tax Act (4 U.S.C. 111) is a question of federal law. See *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624, 628-629 (1953); *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (3d Cir. 1985). This Court has emphasized that, in determining the validity of a state tax whose burden falls upon the federal government or its employees, "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1932). It is therefore necessary to "look through form and behind labels to

⁵ The tax is imposed on the "gross receipts" from employment within the County. That term is defined to mean "compensation" and includes "the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind" (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71).

substance" (*City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 492 (1958)) and to go beyond the "bare face of the taxing statute to consider all relevant circumstances" (*United States v. City of Detroit*, 355 U.S. 466, 469 (1958)). See also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (the constitutionality of a state tax on the "privilege of doing business" under the Commerce Clause does not turn merely on the legislative phrasing, for such "formalism merely obscures the question whether the tax produces a forbidden effect").

In its "practical operation" and effect, the county tax is simply a tax on the "pay or compensation" that respondents receive for their services to the United States and is therefore within the consent provided by 4 U.S.C. 111. The tax is imposed only if a person earns "gross receipts" or receives "compensation" in the form of "salaries, wages, commissions, [or] bonuses" while employed within the County (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71). See note 5, *supra*. Even though phrased as a "privilege" tax, it is imposed only on income as it is received. The tax does not operate as a prerequisite or precondition of employment; it is therefore indistinguishable in its practical operation and effect from other forms of income taxation.

The court of appeals was unduly swayed by the language of the ordinance that makes it "unlawful" for a person not to pay this "occupational" tax (Pet. App. 26-27). It is, by definition, "unlawful" for any person to fail to pay a tax imposed by law. If a State could not make it "unlawful" for a federal officer to fail to pay a tax, the tax could not be enforced; if the tax could not be

enforced, it would then hardly be relevant whether Congress had, or had not, consented to it.

The only "punishment" imposed for a failure to pay the county tax is interest and penalties on the unpaid tax (Jeff. Cty. Ord. 1120, § 10; Pet. App. 77). The fact that Ordinance 1120, in this manner, makes it "unlawful" for anyone to fail to pay the tax does not take the tax outside the scope of the statutory consent. The tax does not discriminate against federal officers and employees; it is imposed on the "pay or compensation" that they receive from their employment (4 U.S.C. 111); it is therefore within the scope of the statutory consent.

c. The decision in this case conflicts with the decision of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985). In that case, the City of Pittsburgh imposed a "business privilege tax" on persons doing business in the city at the rate of five mills per dollar of gross receipts. The United States challenged the application of this "privilege" tax to the official transcript fees of a federal court reporter in the United States District Court for the Western District of Pennsylvania. The Third Circuit concluded, however, that the local "privilege" tax was within the scope of the consent provided by the Public Salary Tax Act, 4 U.S.C. 111. In so holding, the court of appeals disregarded the fact that the Pennsylvania Supreme Court had ruled that the local tax was a "privilege" tax rather than an "income tax" under state law. 757 F.2d at 47. The court of appeals held that federal law, not state law, determines whether the local tax is imposed on the "pay or compensation" (4 U.S.C. 111) of a federal officer. 757 F.2d at 47. The court explained that, in enacting the Public Salary Tax Act, Congress intended

that federal employees "should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits which are accorded to persons engaged in private occupations." *Ibid.*, quoting S. Rep. No. 112, *supra*, at 4. The court stated that the statutory consent to the taxation of the "pay or compensation" of federal officers must be read broadly to comport with that legislative intent. *Ibid.* The court further noted that, in enacting the Public Salary Tax Act, Congress was aware "that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Ibid.*, citing S. Rep. No. 112, *supra*, at 6-10. Because the "business privilege tax" challenged in *City of Pittsburgh* was imposed on the "gross receipts or gross income from the [transcript] fees," the court concluded that Congress consented to the imposition of the tax under 4 U.S.C. 111. 757 F.2d at 47.

d. The Buck Act, 4 U.S.C. 105 *et seq.*, reinforces this understanding of the scope of the consent to state taxation contained in the Public Salary Tax Act. Under the Buck Act, a person who receives "income from transactions occurring or services performed" in a "Federal area" is subject to "any income tax" levied by a state or local government "to the same extent" as if the income was received in an area that is "not a Federal area." 4 U.S.C. 106(a).⁶ The term "income tax" is defined for this

⁶ The term "Federal area" is defined broadly in the Buck Act to mean "any lands or premises held or acquired by or for the use of the United States" (4 U.S.C. 110(e)). This definition appears, by its terms, to encompass premises used by the United States for the purposes of operating a federal courthouse. The origin and purpose of the Buck Act, however,

purpose to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c).

The Buck Act (Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059) and the Public Salary Tax Act (Act of Apr. 12, 1939, ch. 54, § 4, 53 Stat. 575) were both enacted by the same Congress. In adopting the broad definition of the term "income tax" contained in the Buck Act, Congress was aware that States impose a variety of taxes on income that are designated by terms other than "income tax" – such as "corporate-franchise" taxes or "business-privilege" taxes. S. Rep. No. 1625, *supra*, at 5. Congress sought to ensure that state and local governments are authorized to impose taxes measured by the income or receipts from federal employment regardless of how the tax was labelled or described. *Ibid.*

In *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624 (1953), this Court held that the Buck Act consented to the imposition of a municipal "license fee" (of one percent of the wages and "other compensations

was more limited: the statute was designed to ensure that federal officers and employees who reside or work within exclusive federal enclaves would be treated equally with those who reside and work outside such areas. See S. Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940); *United States v. Lewisburg Area School Dist.*, 539 F.2d 301, 309 (3d Cir. 1976). Because the Public Salary Tax Act broadly consents to any tax imposed on the "pay or compensation" of federal employees (4 U.S.C. 111), it is unnecessary to decide whether the Buck Act itself authorizes application of state and local "income taxes" to the salaries of federal judges as compensation for "services performed" in a "Federal area."

earned by every person in the City") on employees who worked at a federal ordnance plant. *Id.* at 625 n.2. The employees had claimed in *Howard* that the local "license fee" was not an "income tax" within the scope of the Buck Act because the Kentucky Court of Appeals had held that "this tax was not an 'income tax' within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City" (*id.* at 628, citing *City of Louisville v. Seabee*, 214 S.W.2d 248, 253-254 (1948)). This Court rejected that argument (344 U.S. at 628-629):

[T]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts.

In dissent in *Howard*, Justice Douglas (joined by Justice Black) urged a contrary point of view that is echoed in the reasoning of the court of appeals in the present case (*Id.* at 629 (citation omitted)):

I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses, professions, and occupations. Many kinds of income are excluded, *e.g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of Appeals held it to be. The Congress has not yet granted

local authorities the right to tax the privilege of working for or doing business with the United States.

The decision of the court of appeals in this case errs for the same reasons that the Court rejected the formalistic interpretation of the statute proposed by the dissent in *Howard*. Both in substance and practical effect, the county ordinance challenged in this case imposes a tax on income received from federal employment, and nothing more. Congress expressly consented to the imposition of such nondiscriminatory state and local taxes upon the "pay or compensation" of federal officers and employees. 4 U.S.C. 111.

3. The decision of the court of appeals holds a county ordinance unconstitutional and, in doing so, conflicts with the decision of another circuit with respect to a sensitive matter of federal-state relations. Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In addition to the question presented in the petition, the Court may wish to direct the parties to address whether this case is within the removal jurisdiction of the federal courts under 28 U.S.C. 1442(a)(3).

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

App. 196

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
*Assistant to the Solicitor
General*

DAVID ENGLISH CARMACK
THOMAS V.M. LINGUANTI
Attorneys

APRIL 1997

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OFFICE OF THE CLERK

No. 98-10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM ACKER and U.W. CLEMON,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

**BRIEF OF RESPONDENT U.W. CLEMON IN
OPPOSITION**

ALAN B. MORRISON

PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street NW

Washington D.C. 20009

(202) 588 7720

Attorney for Respondent U.W. Clemon

August 10, 1998

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Common sense whispers to me that this is the classic tempest in a teapot involving more the clash of powerful egos rather than powerful principles. The outcome of this issue may dent the coffers of Jefferson County or a few federal judges but will speak little to the separation-of-powers principle used to justify this considerable expenditure of public resources.

Pet.App. 67 n.3.

Those words, from the dissenting opinion of Judge Birch on the first rehearing en banc in the Eleventh Circuit, were on the mark then and are even more true today. In the interim, petitioner has sought review in this Court on the merits, and this

Court summarily vacated and remanded on an issue that no one, not even the United States as an *amicus*, had raised. Twelve judges of the Eleventh Circuit reassembled again en banc and issued another lengthy opinion, with three dissents, and again Jefferson County is seeking review in this Court over a sum of money that does not exceed \$668 per judge per year. As Judge Birch also observed, "[i]t is indeed sobering to reflect upon the expenditure of taxpayers' dollars in the resolution of the issue before this court [including the] legal fees and time expended by Jefferson County [and] the expenditure of federal judicial resources" *Id.* More importantly, neither of the issues presented in the petition has any significance beyond Jefferson County and perhaps three cities in Alabama or is for any other reason worthy of this Court's review. Accordingly, for these reasons and others set forth below, the petition should be denied.

STATEMENT OF THE CASE

1. Factual and Statutory Background

This case began with the filing of two separate complaints in the Small Claims Division of the District Court for the Tenth Judicial Circuit for the State of Alabama in Jefferson County on December 29 and December 31, 1992. In these actions, petitioner Jefferson County sought to recover amounts that it claimed were owed by respondents for "license fees," plus interest and penalties, assessed by the County for the privilege of engaging in their occupation as United States District Judges for the Northern District of Alabama in Jefferson County. As judicial officers of the United States, respondents' defense was that the licensing system violated the United States Constitution because it interfered with carrying out their official judicial functions and because it diminished their compensation in violation of Article III. Accordingly, they removed the cases to

the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1442(a)(3), where the cases were consolidated before Senior District Judge Charles A. Moyer of the Northern District of Georgia, sitting by designation.

The statutory basis for petitioner's claims is Jefferson County Ordinance No. 1120 of 1987, enacted after both respondents had been appointed to their judicial offices. Pet. App. 129-39. Under Alabama law, cities and counties have no authority to impose an income tax (*id.* at 84 n.2), but they are permitted by Alabama Act 406, approved September 7, 1967, to enact "a privilege, license, or occupational tax" for those persons who are not otherwise required by Alabama law to be licensed by the State. Pet. App. 126-28. Under Ordinance 1120, which specifically includes all federal and state officials, the amount of the tax is one half of one percent of the gross receipts or compensation earned by the licensee for services performed in Jefferson County. Respondents and four other active judges in the Northern District of Alabama sit in Birmingham, which is in Jefferson County. However, these judges also sit from time to time in the six other Divisions in the Northern District, which, in the case of respondent Clemon, results in approximately one-third of his time being spent outside Jefferson County. With the salaries for District Judges at \$133,600, 28 U.S.C. §§ 135, 461 (1994 & Supp. 1998), the amount at issue per judge can be no more than \$668 and is almost certainly less for at least some judges.

There are a vast number of exemptions to Ordinance 1120 (Pet. App. 143-75), but the most significant one for these purposes is enjoyed by members of the Alabama Bar. Instead of paying a "license fee" of one half of one percent of their gross receipts to Jefferson County, lawyers working there pay bar dues of only \$250 per year, no matter how much they earn.

Several features of the Ordinance are of significance. First, section 2 provides that it "shall be unlawful for any person

to engage in or to follow any vocation, occupation, calling or profession . . . without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession." If a licensee works both inside and outside the County, section 3 requires an apportionment to be made by the licensee's employer or the licensee. Section 4 requires the employer to withhold the amounts due, and section 7 gives the Director of Revenue the authority to audit the books and records of the employer and employee to determine whether the proper fee is being paid. Finally, under section 10(B), if a person "shall fail, neglect or refuse to pay a license fee as by this Ordinance required," such person "shall upon conviction be subject to punishment within the limits of and as provided by law for each such offense." No federal judge has ever been charged under section 10(B), and no entity of the federal government, including the Administrative Office of the United States Courts, has ever withheld the amounts due by respondents or any other federal judge, nor filed any declarations required by Ordinance 1120.

Respondents recognize that they are obligated to pay, and do in fact pay, income taxes to the State of Alabama, provided that they are not imposed on a discriminatory basis. Their objection to the tax here is that it is not an income tax under either Alabama or federal law, but is instead, as the Ordinance itself proclaims, a license fee based on income, assessed by petitioner on respondents for the privilege of being a federal judge. Because that is an imposition made on a federal function, the doctrine of inter-governmental immunity precludes petitioner from imposing such a requirement on respondents whose "license" to be federal judges comes from the United States, not Jefferson County. In addition, as a license fee, it is also an unconstitutional diminishment of their salaries, in violation of Article III of the Constitution, particularly since it was imposed for the first time after they had become federal judges.

2. Prior Proceedings

After the district court denied petitioner's motion to remand based on the claim that the federal courts were barred from hearing this action by the Tax Injunction Act, 28 U.S.C. § 1341, the case proceeded on cross-motions for summary judgment, including a stipulation of facts. Judge Moye carefully analyzed the Ordinance and agreed with respondents that it was an unconstitutional tax on a federal function and that it unconstitutionally diminished their salaries. Pet. App. 82-111.

Petitioner appealed to the Eleventh Circuit, raising only issues on the merits. A divided panel reversed in an opinion written by Judge Birch. In the view of the majority, the license fee was an income tax imposed on respondents, and as such it was entirely lawful. Chief Judge Tjoflat dissented, agreeing with the district court that the Ordinance was unconstitutional on both grounds urged.

Respondents were then granted rehearing en banc, and the full court, by a vote of 9-3, reversed the panel and sustained respondents' claim that the Ordinance imposed an unconstitutional direct tax on the exercise of the federal function of being an Article III judge. In the course of a thorough review of both constitutional doctrine and the statutes cited by petitioner to support its claim that the United States had consented to the imposition of this tax, the majority opinion, written by Judge Cox, focused on the substance of what the Ordinance did, and not on the labels attached to it. As the majority concluded, petitioner was "taxing a federal judge in the performance of his or her duties [which] is fundamentally different from taxing his or her income." Pet. App. 49. They based their conclusion on both Alabama law and their own view of the operation of the statute, principally the portion which, in addition to imposing a tax, also made it "unlawful for a federal judge to perform his or her duties in Jefferson County without paying the privilege tax." *Id.* at 51. In reaching their

conclusion, the majority stated that they had "no doubt that, under the Supremacy Clause, Jefferson County could not enjoin or otherwise prevent a federal judge from performing federal duties [and] that the Supremacy Clause protects the federal judiciary not only from outright obstruction but also from a requirement that a federal judge pay a fee to lawfully perform his or her duties." *Id.* at 51-52.

The court also considered and rejected petitioner's contentions that the Public Salary Tax Act, 4 U.S.C. § 111, and the Buck Act, 4 U.S.C. § 106(a), amounted to consents to impose the taxes here. As for the former, the majority reasoned that, while "Congress intended to consent to state taxation of federal employees' income to reciprocate for the imposition of the federal income tax on state employees, [Congress did] not consent to all state taxes on federal employees," in particular those "state taxes that in substance are not taxes on income." *Id.* at 56. With respect to the Buck Act, it correctly noted that "the Buck Act merely precludes a taxpayer from arguing that a state or locality lacks jurisdiction to tax her because she resides in a federal area or receives income from transactions or services in a federal area," contentions that respondents have never made. *Id.* at 58, 60. In light of its conclusion that Congress did not consent to these taxes, the court found it unnecessary to reach the issue of whether Article III would forbid it from doing so, as the district court had concluded. *Id.* at 35.

Judges Birch and Henderson, who had comprised the majority of the panel, dissented, joined by Judge Anderson. *Id.* at 63-74. Their principal disagreement was over the proper characterization of the operation and effect of the Ordinance, which they believed were indistinguishable from those of an income tax which everyone agreed could be lawfully imposed. Finally, because nine of the members of the Eleventh Circuit have sat in Jefferson County within the last five years, and hence would be liable for the tax for their time spent there, the court

also addressed recusal and unanimously concluded that all of the judges could properly sit on this appeal. *Id.* at 74-81.

Jefferson County was not ready to quit. It filed a petition with this Court (No. 96-896) seeking review on the merits. At the invitation of the Court, the Solicitor General filed a brief (*id.* at 176-96), which urged the Court to grant review because the decision below was incorrect and it was in conflict with a decision of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985), a case that the Eleventh Circuit majority had distinguished because of significant differences in the two ordinances. Pet. App. 56 n.19. The Solicitor General also suggested that the basis for removal under section 1442(a)(3) was unclear -- an issue raised neither by petitioner nor any of the thirteen judges who had considered the case -- and suggested that the Court might wish to have that issue briefed if review were granted. The Solicitor General did not suggest that statutes such as Ordinance 1120 were common or even that any other place besides Alabama had one remotely like this one.

On June 9, 1997, this Court granted review and summarily vacated and remanded the case for further consideration in light of *Arkansas v. Farm Credit Services*, 117 S.Ct. 1776 (1997), which had been handed down the previous week. At issue in *Farm Credit Services* was the applicability of the Tax Injunction Act in an action in which a government-created corporation had sued in federal court to invalidate a state tax, but in which the United States was not a party. This Court found the Tax Injunction Act was a bar in those circumstances, and its remand order in this case suggested that it might also be a bar here, although petitioner had not raised that Act in either the court of appeals or in its submissions in this Court.

The Eleventh Circuit dutifully reconvened en banc, and in another carefully considered and detailed opinion for the

majority, Judge Cox held that the Tax Injunction Act was inapplicable. Although rejecting the argument that the removal provision that conferred federal jurisdiction was alone sufficient to overcome the Act, it read the provision as evidence of congressional intent that officers of the United States, raising federal defenses tied to their positions as federal officers, should be able to litigate them in federal court, even where the collection of state taxes was at stake, just as the United States could do in a similar situation. Pet. App. 21. As the court put it, "refusing to apply the exception in this case [because the Attorney General had not sided with the judges] would be equivalent to a finding that Congress intended to put the judicial branch at the mercy of the executive." *Id.* at 22.

The same three dissenters from the prior en banc decision also dissented on remand, this time joined by Judge Carnes who, after reading the brief of the United States filed in this Court, changed his mind on the merits. *Id.* at 24. All of the dissenters except Judge Anderson would also have reversed under the Tax Injunction Act, but none of them agreed with the Solicitor General that there was any problem with the original removal under section 1442(a)(3).

REASONS FOR DENYING THE WRIT

The principal reason why certiorari should be denied is that this case is truly unique; neither of the questions presented has previously arisen in this context, nor is there any reasonable likelihood that either will arise again if review is denied. So far as anyone has been able to determine, only three cities in the state of Alabama have laws like Ordinance 1120, and no other city, county, or state has a licensing provision like Ordinance 1120. Now that the constitutional issue has been resolved in the Eleventh Circuit, that not only ends the merits inquiry, but effectively precludes the procedural issues from arising in the

future in a similar context.

Nor does the petition suggest otherwise. With the exception of the ordinance involved in the *City of Pittsburgh* case discussed below, it points to no laws that would be affected by the merits, and it does not even suggest that the Tax Injunction Act issue has arisen in a context like this one. Nor does the petition attempt to offer reasons for granting review other than to correct what it asserts to be erroneous rulings, as evidenced by the heading on page 12 of the petition: "**ARGUMENT ON THE MERITS.**" Indeed, even the *amicus* brief submitted by the United States on the prior petition did not suggest that there was any reason for granting the petition other than the fact that the decision below was incorrect. Thus, even if Eleventh Circuit were mistaken (which it is not), this case would not satisfy the requirements of this Court's Rule 10.

A. The Tax Injunction Issue.

To the best of our information, the applicability of the Tax Injunction Act, 28 U.S.C. § 1341, has never previously been considered by any federal court in a situation like this. Unlike every other case of which we are aware, this case did not begin with a taxpayer suing the taxing authority, but the other way around. Petitioner filed suit in small claims court in Alabama, under state law, against respondents who, because they are federal judges, were entitled to remove their cases to federal court under 28 U.S.C. § 1442(a)(3). These cases were not originally, and are not now, actions to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax" as that phrase is used in section 1341. To the contrary, this is a suit by a taxing authority to collect a tax in which the courts have upheld the claims of the taxpayers against the petitioner Jefferson County. In the nearly 50 years that the Tax Injunction Act has been the law, there is no reported case like this one, let alone one decided by this Court or a court of appeals.

There is a good reason why no such case has arisen and why none is likely to arise in the future: apart from the barriers created by the Tax Injunction Act, it would be almost impossible for a suit like this to be removed to federal court because, where the federal issue is a defense to a claim, not the claim itself, there is no "arising under" jurisdiction under 28 U.S.C. § 1331. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). It is only because of the status of respondents as federal officers, and because their defense is based on the fact that the petitioner is seeking to impose a tax because of their official conduct in office (carrying on the business of being a federal judge), that this case is removable under section 1442(a)(3).

Finally, as the well-reasoned opinion of the court of appeals on remand recognized, the existence of this narrow removal provision evinces Congress' intent to assure that federal officers can have access to the federal courts to have the validity of federal defenses relating to the performance of their official duties adjudicated in the federal rather than in the state courts. It is this "other side of federal balance" that this Court also recognized in *Farm Credit Services*, *supra*, 117 S.Ct. at 1780, which tips the scales in favor of an implied exception to the Tax Injunction Act here, but not in *Farm Credit Services*. In respondent's view, the majority below was entirely correct on this issue, but even it were not, this "once in a blue moon" application of the Tax Injunction Act is so unlikely to occur outside of Alabama, let alone the Eleventh Circuit, as to make this issue entirely uncerworthy.¹

¹ Although not raised in the questions presented, the petition suggests (at 11, 25) that the cases were not properly removable under 28 U.S.C. § 1442(a)(3). We doubt that the issue is fairly
(continued...)

B. The Merits Issue.

The petition points to no statutes outside of Alabama which seek to impose licensing requirements on federal judges or any other federal officials. Its main focus is on what it perceives to be errors in the majority's approach, not on the importance of this Court's reviewing this case to anyone other than the immediate litigants, and perhaps the other eleven authorized federal judges in Alabama. See 28 U.S.C. § 133.

Thus, the petition admits, even proclaims (at 12), that "This is a case of FIRST IMPRESSION," a view shared by the Eleventh Circuit: "The parties have not cited, and we have not found, any federal case addressing whether the intergovernmental tax immunity doctrine prohibits a state or local government from imposing a privilege tax on Article III judges." Pet. App. 37. According to petitioner, this Court should nonetheless grant review because the court of appeals "misfocused" its attention on the wrong issue; it made an "unsupported construction" of two federal statutes; and it "ignored" another statute and an Executive Order. Petition at 13. "Moreover," argues the petition, "the court of appeals refused to follow several decisions of this Court which establish the tests to determine" the proper outcome in this case. *Id.* at 13-14.

Making an error of law is not, except in the most unusual of circumstances, a reason to grant review under Rule 10. To

(...continued)

comprised in the questions that are presented, but it too is unlikely to recur. Moreover, not one of the twelve judges who heard the case on remand agreed with petitioner or saw any merit with the position taken by the Solicitor General in his *amicus* brief to this Court, which was attached as an appendix to petitioner's brief on remand.

be sure, the cases cited by petitioner, all of which were discussed by the majority, bear on the issue, but none of them involves facts remotely like this case and hence resolved a legal issue like the one decided here. For example, in *Howard v. Commissioner of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953), there was no licensing of federal officials, let alone federal judges, and its principal focus was on the Buck Act, which prohibits federal employees from objecting to income taxes on the basis that the money was earned while on federal property, a claim never made here.²

The other cases relied on by petitioner are equally inapposite. Thus, in *Department of Employment v. United States*, 385 U.S. 355 (1966), the Court ruled that Congress had not waived the exemption for unemployment compensation taxes enjoyed by employees of the Red Cross, and in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), the Court found no exemption from what was admittedly a garden variety income tax for employees of an instrumentality of the federal government. Moreover, in *United States v. New Mexico*, 455 U.S. 720 (1982), the Court held that private contractors working for agencies of the United States were not immune from certain taxes on the sales of goods and services which they acquired in connection with their work for those agencies. There is, to be sure, analysis and language in those decisions that bears on this situation, but their facts are so different from this case that there are no "conflicts with relevant decisions of

² The broad definition of income tax in 4 U.S.C. § 110(c), which includes taxes that are "measured by . . . gross receipts," is limited to "sections 105-109 of this title." The Buck Act, which is section 106, is thus covered, but the Public Salary Tax Act, which is in section 111, and on which the petition places principal reliance, is not. See Pet. App. 119-121.

this Court" of the kind that this Court has found in granting review pursuant to Rule 10(c). Moreover, under Rule 10, the case must involve "an important federal question," not one like this that has never arisen before and is highly unlikely to be repeated in the future.

Finally, in footnote 9 on page 20, petitioner asserts that the decision below "*directly conflicts* with the holding of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985)" (emphasis in petition). Once again, although the ordinances at issue in both cases impose taxes that are borne by a person employed by the federal judiciary, the similarities end there. In *Pittsburgh*, the law required court reporters (and all others doing business in the City) to pay a tax based on their sales, which included transcripts sold to private parties, but not the reporter's federal salary. Unlike this case, there was no attempt to license a federal function, let alone an attempt to do so to a federal judge based on his salary. Contrary to petitioner's beliefs, the decision below does not threaten to remove the power to impose income taxes on federal judges; it simply stops localities from attempting to make federal judges pay for the privilege of carrying out their Article III duties.³

There are two other reasons why this Court should decline review. Even if this Court were to agree with petitioner on either or both of these questions presented, this litigation would not be over. Either the case would be remanded to state court, where it would begin again, or, if the Court found for

³ See also *Cook v. Commissioners of Sinking Fund of City of Louisville*, 312 Ky. 1, 226 S.W.2d 328 (1950) (ordinance similar to Pittsburgh's and distinguishable from Jefferson County's because *inter alia*, (1) the fee was an across-the-board tax, with no exemptions for those already licensed by the state, and (2) the failure to obtain a license was not "unlawful").

petitioner on the merits, the court of appeals (presumably en banc) would have to consider respondents' Article III compensation diminishment claims. Second, a certified class action in the Alabama state courts, which includes classes of both federal and non-federal workers, and which challenges Ordinance 1120 on grounds other than those raised here, was tried last fall and a decision is expected shortly. *Richards v. Jefferson County*, Circuit Court of Jefferson County, Case No. CV-92-3191, Order Certifying Class dated May 14, 1997, on remand from *Richards v. Jefferson County*, 116 S.Ct. 1761 (1996) (reversing dismissal based on improper reliance on res judicata). If plaintiffs in *Richards* prevail, Ordinance 1120 will become a dead letter even if petitioner were to prevail on every issue in this case.

* * *

We end where we began. Ordinance 1120 is a unique creature, found in only three other places in Alabama and nowhere else. As such, the decision below will have an impact on only those four locations and only if they seek to license federal judges. Indeed, the uniqueness of Ordinance 1120 is also responsible for the novel way in which the Tax Injunction Act arises. This case has already received full review by a district judge, a court of appeals panel, and two en banc sittings of twelve circuit judges; Jefferson County has had far more process than it is due in its efforts to collect a few hundred dollars a year from federal judges. Enough is enough.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

Alan B. Morrison
Public Citizen Litigation Group
1600 20th Street NW
Washington D.C. 20009
(202) 588 7720

*Attorney for Respondent U.W.
Clemon*

August 10, 1998

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**BRIEF OF RESPONDENT WILLIAM M. ACKER,
JUDGE, IN OPPOSITION**

Irwin W. Stolz, Jr.
Counsel of Record
Seaton D. Purdom
Gambrell & Stolz, L.L.P.
4300 One Peachtree Center
303 Peachtree Street NE
Atlanta, Georgia 30308
(404) 577-6000
*Attorneys for Respondent
Judge William M. Acker, J*



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**CITATIONS OF THE OPINIONS AND JUDGMENTS
ENTERED IN THE COURTS BELOW**

The 11th Circuit En Banc Opinion (*Jefferson County, Alabama, v. Acker*, 137 F.3d 1314 (11th Cir. 1998)) after remand by this Court is annexed to the Appendix to the Petition for Certiorari in this case as Petition Appendix ("Pet. App."), pp. 1-25. The original 11th Circuit En Banc Opinion (*Jefferson County, Alabama, v. Acker*, 92 F.3d 1561 (11th Cir. 1996)), reinstated after consideration of the issue remanded, is annexed to the Appendix to the Petition for Certiorari in this Case as Petition Appendix, pp. 26-81. The District Court Opinion (*Jefferson County, Alabama, v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994)), is annexed to the Appendix to the Petition for Certiorari in this Case as Petition Appendix, pp. 82-116.

The En Banc Order, *Jefferson County, Alabama v. Acker*, 73 F.3d 1066 (11th Cir. 1996), expressly vacates the prior panel Opinion (*Jefferson County, Alabama v. Acker*, 61 F.3d 848 (11th Cir. 1995)). Neither appears in any party's Appendix.

STATEMENT OF THE CASE

Respondent Judge Acker cannot accept the statement of the case submitted by the petitioner. Especially, respondent cannot accept the repeated unsupported assertion in the Petition that the case arrives here with an "undisputed fact" that the Jefferson County tax at issue is levied upon gross receipts, pay or income. The En Banc Opinion of the United States Court of Appeals for the Eleventh Circuit, reinstated after remand in this case, simply does not so hold. It holds just the opposite. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1570 [7] (11th Cir. 1996). The

following is submitted as a more accurate statement of the case.

**A. STATEMENT OF PROCEEDINGS AND
DISPOSITION OF THE CASE**

In December 1992 Jefferson County, Alabama commenced separate civil actions against Defendants William M. Acker, Jr. and U. W. Clemon, United States District Court Judges for the Northern District of Alabama, Birmingham Division, in which suits Jefferson County sought to recover for alleged delinquent licensing taxes under Jefferson County Ordinance 1120. The actions were removed by Judges Acker and Clemon as federal officers. Motion for remand was filed by Jefferson County, denied, and never appealed.

The District Court held, among other things, that the Ordinance was an unconstitutional effort to tax the performance of the judicial office, in conflict with Article III, Section 1 of the Constitution of the United States. *Jefferson County, Alabama, v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994). Holding that the taxable event under the language of the statute under settled Alabama case authority was the performance of the judicial function, the trial court sustained the defendant judges' motions, ruling that the Ordinance conflicted with Article III, § 1 of the Constitution of the United States, a matter beyond the competence of Congress or the Executive Branch to waive. *Jefferson County v. Acker*, 850 F. Supp. 1536[5-8] (N.D. Ala. 1994). The trial court also held that the county tax presented an unconstitutional diminution of the salaries of the United States District Court judges, who had been appointed prior to the enactment of the Ordinance. *Id.*

By Opinion entered August 21, 1995, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed the Order of the trial court, holding that the tax was in essence an income tax and that the tax did not present an unconstitutional diminution of the Article III judges' compensation. *Jefferson County v. Acker*, 61 F.3d 848 (11th Cir. 1995). After timely Motion for Rehearing and Suggestion of Rehearing En Banc was filed by the defendant/appellee Article III judges, rehearing en banc was granted by Order entered January 12, 1996 and the prior divided panel Opinion was vacated. *Jefferson County, Alabama v. Acker*, 73 F.3d 1066 (11th Cir. 1996).

En Banc, the United States Court of Appeals for the Eleventh Circuit held that the Jefferson County tax was not a tax on gross receipts, income or pay, but instead was a tax levied on the performance of work itself within the County. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1570 [7] (11th Cir. 1996). The Eleventh Circuit held that the tax was a tax on the performance of the judicial function itself -- rather than upon the receipt of funds -- and was an unconstitutional tax in violation of intergovernmental tax immunity, with significant burdens sought to be imposed by the tax on the judicial function itself. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1571-1573 [11-12] (11th Cir. 1996). Finally, the Eleventh Circuit held that neither the Public Salary Act nor the Buck Act purported to authorize such a tax. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1571-1573 [13-14] (11th Cir. 1996).

Hence, the Eleventh Circuit first En Banc Opinion differed from the District Court's Opinion in that the Eleventh Circuit first En Banc Opinion did not question the constitutionality of either the Buck Act or the Public Salary Act. Instead, the first En Banc Opinion held the Buck Act

and the Public Salary Act to be inapplicable by reason of the structure of the tax at issue. *Id.* The Eleventh Circuit Opinion did not reach the issue of whether the Jefferson County tax brought about an unconstitutional diminution of the appellee judges compensation. *Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1566 (11th Cir. 1996). The prior panel Opinion having been vacated, this left the District Court's Opinion in place on the issue of unconstitutional diminution of compensation.

Jefferson County, Alabama petitioned this Court for grant of the writ of certiorari, contending that its privilege tax/license fee was a tax upon "gross receipts" and that the defense by Article III judges of intergovernmental immunity had been waived by the Public Salary Act and by the Buck Act. After Judges Acker and Clemon filed their response in opposition to the petition, this Court by order sought response to the petition from the executive branch of government of the United States. On behalf of the executive branch, the office of the Solicitor General of the United States filed a response to the petition under which the executive branch of the government of the United States made a general appearance in the case without reservation of any objection. The Solicitor General filed a response which -- without expression of any consideration of the details of the language of Jefferson County Ordinance 1120 -- urged: (1) that the license fee/privilege tax of Ordinance 1120 was measured by "income" or "gross receipts"; and, (2) that the defense of Article III judge's intergovernmental immunity had been waived by the enactment of the Public Salary Act and the Buck Act.

This Court by per curiam opinion granted the writ of certiorari, vacated the Eleventh Circuit first en banc Opinion, and remanded for consideration of whether the

exercise of federal officer removal jurisdiction was permissible under *Arkansas v. Farm Credit Services*, ___ U.S. ___, 177 S.Ct. 1776 (1997). *Jefferson County v. Acker*, ___ U.S. ___, 117 S.Ct. 2429, 138 L.Ed.2d 191 (1997).

The Eleventh Circuit then required further en banc briefs to be filed by interested parties. In its en banc remand brief, Jefferson County, Alabama, urged, among other things, that because the Solicitor General had not joined in the United States Supreme Court in seeking the relief sought by the Defendant Article III Judges (attaching the Solicitor General's brief to the en banc brief), it followed that federal officer removal jurisdiction had not existed in the case from the outset of the filing of the removal papers. Jefferson County, Alabama, also urged that the intergovernmental immunity defense raised by Judges Acker and Clemon in their removal papers was not a plausible defense on the merits by reason of contended waiver of such defense by Congress and the Executive Branch in the enactment into law of the Public Salary Act and in the enactment into law of the Buck Act.

On remand, the Eleventh Circuit examined the language of the license fee/privilege tax and held that the taxable event under the Ordinance was the performance of federal judicial duties in Jefferson County, Alabama, not the receipt of compensation. Pet. App., p. 4. In this, the language of Ordinance 1120 provides that a Jefferson County is entitled in disputes over allocation of "gross receipts" for in-county work under the license fee/privilege tax to examine the books and records of the person rendering services in Jefferson County to determine proper allocation. Ordinance 1120, § 7; Pet. App., p. 137. The Eleventh Circuit further held that engagement in judicial activity without paying the license fee was made illegal under the Ordinance. Pet. App.,

p. 6 (each day of violation constituting a separate offense, Pet. App., p. 31 fn 5). The Eleventh Circuit also held that Congress, in enacting federal officer's removal jurisdiction, could not have meant for such removal jurisdiction to fail in the event that a recalcitrant executive branch official should fail to support removal where removal would otherwise be authorized. Pet. App., p. 22. Thus, under a federal instrumentality exception to the Tax Injunction Act, the Eleventh Circuit en banc sustained federal jurisdiction and reinstated the prior en banc Opinion.

This second petition for certiorari followed. In the second petition, Jefferson County, Alabama, contends: (i) that removal was per se improper under *Arkansas v. Farm Credit Services*, ___ U.S. ___, 177 S.Ct. 1776 (1997) absent joinder by the Executive Branch of the United States in the relief sought; and (ii) that the basis for removal, intergovernmental Article III judges' immunity was waived by the enactment of the Public Salary Act and the Buck Act, so that the removal was improper without looking further.

B. STATEMENT OF FACTS

The essential material facts needed to show the correctness of the Eleventh Circuit second En Banc Opinion are set forth in the En Banc remand Opinion (Pet. App., pp. 1-25), in the prior En Banc Opinion itself (*Jefferson County, Alabama, v. Acker*, 92 F.3d 1561, 1566 (11th Cir. 1996)), in the District Court Opinion (*Jefferson County v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994)), and appear without dispute in the record brought up in the prosecution of the appeal.

In 1987, the Jefferson County Commission, the

governing body of the County, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the County not required by state law to pay a privilege, license or occupational tax to the state. *Jefferson County v. Acker*, 850 F. Supp. 1536 (N.D. Ala. 1994).

Jefferson County Ordinance No. 1120 provides:

It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession ... within [Jefferson] County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (½%) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance 1120, § 2; Pet. App., p. 132.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession....

Ordinance 1120, § 1; emphasis added; Pet. App., pp. 131-132. The Ordinance calls for the records to be kept by the employer or the employee to determine the compensable work done within the County and lays the tax on that work. Ordinance 1120, §§ 4-7; Pet. App., pp. 133-135; Ordinance 1120, §§ 1(f), 2; Pet. App., pp. 131-132.

These defendants were Article III judges prior to the enactment of the ordinance. *Jefferson County v. Acker*, 850 F. Supp. 1536, 1548 (N.D. Ala. 1994). Under unreversed Alabama case law, a similarly situated Alabama judge could not be subjected to such a license fee/privilege tax enacted after appointment to office, because of Alabama's ban on diminution of the salaries of sitting judges. *In re Opinions of the Justices*, 225 Ala. 502, 144 So. 111 (1932).

The Northern District of Alabama is composed of 31 counties, including Jefferson County. *Jefferson County v. Acker*, 850 F. Supp. 1536, 1549 (N.D. Ala. 1994). Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama. *Jefferson County v. Acker*, 850 F. Supp. 1536, 1549 (N.D. Ala. 1994).

SUMMARY OF ARGUMENT

The issues presented by the petition for certiorari arise out of the peculiar language of Ordinance 1120 which defines "gross receipts" to require nothing be received at all. The case is isolated and unworthy of certiorari. The Eleventh Circuit properly concluded that federal officer removal jurisdiction does not depend upon whether the Solicitor General later decides to support removal.

The Eleventh Circuit, in its second en banc Opinion

reinstating its first en banc Opinion, properly determined that neither the Public Salary Act nor the Buck Act presented a waiver of the defense of intergovernmental immunity with regard to Ordinance 1120. Identification of the taxable event or legal incidence of a state statute is first a question of statutory interpretation under state law. Here, the United States Court of Appeals for the Eleventh Circuit correctly drew upon Alabama precedents and upon the plain language of Jefferson County, Alabama Ordinance 1120 to determine that the taxable event of the Ordinance is the rendition of compensable services, without regard to whether compensation is actually received. Thus, the tax under the Ordinance is imposed upon the performance of the judicial function itself. The reporting and proration requirements of the Ordinance are also brought to bear against the judicial function itself. The tax, therefore, violates intergovernmental tax immunity.

ARGUMENT AND CITATION OF AUTHORITY

- A. THE ISSUES PRESENTED BY THE PETITION FOR CERTIORARI ARISE OUT OF THE PECULIAR LANGUAGE OF ORDINANCE 1120 WHICH DEFINES "GROSS RECEIPTS" TO REQUIRE NOTHING BE RECEIVED AT ALL.

Judge Acker joins in and adopts the Response to the Petition for Certiorari filed by Judge Clemon. The issues presented by the petition for certiorari arise out of the peculiar language of Ordinance 1120 which defines "gross receipts" to require nothing be received at all. The issues are unlikely ever to be presented again and represent no division of authorities among the Circuit Courts of Appeal.

No significant issue is presented by the determination by the Eleventh Circuit that the Solicitor General's assent is not necessary to provide removal jurisdiction, which exists at the time of removal. *Arkansas v. Farm Credit Services*, ___ U.S. ___, 177 S.Ct. 1776 (1997), by citation of *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) as instructive and by citation with approval of *Federal Reserve Bank v. Commissioner of Corps. and Taxation*, 499 F.2d 60 (1st Cir. 1974), allows for federal instrumentality exception to the Tax Injunction Act without joinder of the United States. See, Pet. App., pp. 12-22.

Judge Acker further alerts the Court to the fact that a decision is imminent in *Richards v. Jefferson County*, Circuit Court of Jefferson County, Case No. CV-92-3191, a class action challenging the entire Ordinance (See, Exhibit A annexed hereto; Clemon Response to Petition, p. 14) so that the case may prove to be particularly unworthy of the grant of certiorari if the tax is struck down in November 1998.

**B. THE PETITION INACCURATELY
CHARACTERIZES THE TAX AS ONE
ON INCOME OR GROSS RECEIPTS.**

While the District Court Opinion viewed the Jefferson County tax at issue as being levied upon gross receipts, the first En Banc Eleventh Circuit Opinion, reinstated and sought to be reviewed here, specifically holds the following:

The Alabama Supreme Court's

determination of the operation of the Auburn ordinance is a reasonable interpretation of how the identical Jefferson County ordinance operates. Our examination of the Jefferson County ordinance, within the context of Alabama law, reveals that the privilege tax is a tax on the performance of work in Jefferson County. In substance, the privilege tax does not tax the receipt of income.

The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance No. 1120, § 2. **This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.**

Other provisions of the ordinance further demonstrate that the privilege tax does not merely tax the receipt of income. **The privilege tax is levied not only on income received but also on income that one is entitled to receive, *id.* § 1(F), indicating that the ordinance is concerned with ensuring that work is taxed regardless of whether income from the work actually is received.** Moreover, persons engaged in occupations or businesses for which they are required to pay state or other Jefferson County license fees are exempted from paying the privilege tax under Ordinance No. 1120. *Id.* § 1(B). We do not understand why, if the

ordinance is an income tax, it exempts from its requirements persons paying license fees to Jefferson County or to the State of Alabama, license fees that are totally unrelated to income. This exemption makes sense only if the ordinance aims to ensure that a license fee is paid to some unit of government for all work performed in Jefferson County.

We hold that the Jefferson County privilege tax is not, in substance, a tax on income. Though the privilege tax is measured by income, at least roughly, its other attributes remove it from any reasonable conception of an income tax. Therefore, this case is not controlled by O'Keefe's holding that income taxes do not interfere with federal functions in violation of the intergovernmental tax immunity doctrine.

Jefferson County, Alabama, v. Acker, 92 F.3d 1561, 1570 [7] (11th Cir. 1996); emphasis added, footnote omitted. The Petition now before this Court inaccurately contends that the tax is levied is on gross receipts, income or pay. See Petition, pp. 20-21 n7 (linking "gross receipts" to Buck Act). Accordingly, the Petition now before this Court is based upon a misstatement of what the En Banc Opinion holds. The Petition is thus directed to an Opinion not written and presents nothing for the type of review contemplated by Rule 10(c) of this Court.

C. **THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE JEFFERSON COUNTY TAX HAS TAXABLE EVENT AS THE PERFORMANCE OF COMPENSABLE SERVICES WITHIN THE COUNTY AND THUS IS LEVIED UPON THE JUDICIAL FUNCTION AS TO ARTICLE III JUDGES, SO THAT THE JEFFERSON COUNTY TAX VIOLATES INTER-GOVERNMENTAL TAX IMMUNITY, BASED UPON WELL SETTLED AUTHORITIES, SO THAT NO DISTURBANCE IN PRECEDENT IS PRESENTED.**

- 1) Identification Of The Taxable Event Or Legal Incidence Of A State Statute Is First A Question Of Statutory Interpretation Under State Law.

In determining whether a tax imposed by a State offends intergovernmental immunity, the determination of the "taxable event" and the "legal incidence" of a tax imposed by an arm of State government is first a question of State law statutory interpretation of the State statute imposing the tax. *United States v. State Tax Commission of the State of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975); *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U. S. 9, 11 (1985); *Oklahoma Tax Commission v. Chickasaw Nation*, ___ U.S. ___, 115 S.Ct. 2214, 132 L.Ed. 2d 400 (1995). If, under the interpretation given such a State tax statute by State law rules of statutory construction, the legal incidence

of the tax is made by the statute to fall on an instrumentality or function of the federal government, then the tax offends intergovernmental tax immunity and must fall, regardless of any secondary argument which might be made as to who actually ends up paying the tax under an analysis of the practical effect of the tax. *United States v. State Tax Commission of the State of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975). The secondary test of inquiry into the practical effect of a statute comes into play only if the legal incidence and taxable event as determined by State law are proper subjects for taxation. *Id.*, 421 U.S. 559. When, under the first test, the State law is found to rest upon a State's attempt to exercise power which it does not have, then there is nothing upon which the "practical effect" test can operate. *Id.*

Where State law, as interpreted by the State Court itself, shows that the tax is levied on a federal function, the inquiry ends short of any consideration of "practical effect." *United States v. State Tax Commission of the State of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975). Here, the state law precedents and the face of the ordinance itself shows that the legal incidence of the tax, as applied to Article III judges, is upon the performance of the judicial function itself, so that the ordinance offends intergovernmental tax immunity of the judicial branch of government of the United States.

- 2) The United States Court of Appeals for the Eleventh Circuit Properly Found That, Under Applicable Precedent, The Taxable Event Under The Jefferson County Ordinance Was The Performance Of The Judicial Function Within Jefferson County.

In the case at bar, the United States Court of Appeals for the Eleventh Circuit properly and routinely applied Eleventh Circuit and United States Supreme Court precedent to determine the legal incidence and the taxable event described by the statute. In testing constitutionality of a State statute, the federal courts

... do not sit to question [the state supreme court's] interpretation of that state's statutes *

* * It is well-settled that "state courts have the right to construe their own statutes," *Bank of Heflin v. Miles*, 621 F.2d 108, 113 (5th Cir. 1980), and federal courts are bound by that state interpretation. *Id.* at 114. See also *Sanchez v. United States*, 696 F.2d 213, 216 (2d Cir. 1982) ("To comply with the principle of comity which undergirds our federal system, we are obliged to give full effect to decisions of New York's highest court on issues involving the application of New York law."). When ruling upon the constitutionality of a state statute, a federal court "may only consider the statute's plain meaning and authoritative state court constructions of the statute." *Florida Businessmen v. State of Florida*, 499 F. Supp. 346, 352 (N.D. Fla. 1980).

Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, at 667 (11th Cir. 1984).

"A federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would

decide the issue otherwise." *Silverberg, v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983); see *Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983); *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 945 (11th Cir. 1982). This is true, even if the federal court does not agree with that state court's reasoning or the outcome which the decision dictates. *Silverberg*, 710 F.2d at 690.

Provau v. State Farm Mut. Auto. Ins. Co., 772 F.2d 817, at 820 (11th Cir. 1985). Following these precedents, the Eleventh Circuit's first en banc Opinion properly considered *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972) (interpreting a virtually identical occupational tax). Based upon *McPheeter* and based upon its own independent analysis of this Court's precedents, the Eleventh Circuit Opinion here found that **the taxable event described in the Jefferson County occupational tax was the performance of work within Jefferson County for which the taxpayer was entitled to be paid, whether payment would in fact eventually be forthcoming or not.** *Jefferson County v. Acker*, 92 F.3d 1561, 1570-1571 (11th Cir. 1996).

To the same effect, the District Court had likewise concluded: "The tax here becomes effective even before the income is earned, and before it is paid, and before it is received." *Jefferson County v. Acker*, 850 F. Supp. 1536, at 1543-44, fn. 14 (N.D. Ala. 1994). That conclusion of law was never challenged by the appeal as made out by the appellant. Nor has that conclusion been challenged by the Petitioner in the Petition here. Instead, the Petition inappropriately seeks to avoid this pivotal conclusion of law by pretending it to be swept away by a claim of "undisputed

fact."

This pivotal conclusion of law made by the both the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit, moreover, is manifestly correct under applicable Alabama law and under the language of the Ordinance itself.

The result reached by the District Court has direct support in that part of the language of *McPheeter* which construed an equivalent tax ordinance:

Imposing payment of the tax or license fee on the individual so engaged and employed, places no tax burden on Auburn University, the State, or the federal government as such. The tax is not levied on the employer-employee relationship, but on **the taxable event of rendering services or following a trade, business, or profession.** The ordinance places the tax on an **employee's privilege of working in the city limits** of Auburn regardless of the person's employer or the place of residence of the employee.

McPheeter, 288 Ala. 286, 259 So.2d 833, 835. Here, the District Court's and the Eleventh Circuit's decision following *McPheeter* was also supported by the statutory and constitutional environment within which the tax ordinance was enacted. The Alabama Constitution forbids local legislation in areas occupied by general legislation. Alabama Const., Art. 4, § 105. It also provides for general legislation to provide for an income tax. Alabama Const., Amend. No.

25. The enabling legislation pursuant to which the Jefferson County tax ordinance was enacted provides for taxation by counties of the pursuit of vocations and occupations. 1967 Ala. Laws, No. 406. Thus, Jefferson County could not levy a true income tax under Alabama law.

Further, the Eleventh Circuit's reinstated Opinion went beyond the Alabama authorities and analyzed the effect of the language of the Ordinance itself. *Jefferson County v. Acker*, 92 F.3d 1561, 1570-1571 (11th Cir. 1996). The language of the tax ordinance itself shows that the tax is incurred when compensable work is performed and there is an entitlement to compensation, regardless of whether compensation is ever in fact received:

It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession ... within [Jefferson] County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (½%) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance 1120, § 2; Pet. App., p. 132.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, ~~or~~ any other

considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession....

Ordinance 1120, § 1; emphasis added; Pet. App., pp. 131-132. Thus, a house painter, or a federal judge, who is entitled to be paid, suffers the tax on the gross amount to which he or she is entitled, regardless of whether payment is made. Hence, the plain language of the tax ordinance shows that it is levied on the value of the services rendered within the county, thus making it an occupational tax on compensable services at the time of their rendition. If it had any other effect -- if the taxable event were the receipt of compensation -- the fate under Alabama Const., Article IV, § 105 would be contrary to the result reached in McPheeter.

Based upon *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988) (interpreting the tax ordinance at issue) and *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972), the District Court correctly found the Alabama precedents to call for construction of the Ordinance at issue as being laid upon the rendition of compensable services -- here the function of the judiciary itself. *Jefferson County v. Acker*, 850 F. Supp. 1536, 1543-44 (N.D. Ala. 1994). That ruling of the District Court -- the determination of applicable state law precedent and statutory construction -- was never challenged in any way in the appeal as made out by the appellant's principal brief on appeal.

Under *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, at 820 (11th Cir. 1985), federal courts are required to follow State court construction of State law "even if the

federal court does not agree with that state court's reasoning or **the outcome which the decision dictates.**" *Id.*; emphasis added. The "practical effect" of the tax is not that of an income tax, as the Petitioner argues based upon the statute's wording that it is levied upon "gross receipts." Indeed, examination of the Ordinance reveals that if a federal judge were to work and be entitled to compensation, a tax under the Ordinance would be incurred, without regard to whether compensation was ever received.

Jefferson County Ordinance 1120 presents this Court with a redefinition of the phrase "gross receipts" so severe as to put the meaning of that phrase in the Ordinance out of touch with the meaning of the same phrase as it occurs in statutes, caselanguage, and other common use of English. In ordinary usage, the word **receipt** is defined as follows:
re·ceipt (rĭ-sĕt¹) noun

Abbr. rcpt., rec., rect.

1. a. The act of receiving: We are in receipt of your letter. b. The fact of being or having been received: They denied receipt of the shipment. 2. Often receipts. A quantity or amount received: cash receipts. 3. A written acknowledgment that a specified article, sum of money, or shipment of merchandise has been received.

American Heritage Dictionary. In Ordinance 1120, however, "gross receipts" refers to amounts which to which **taxpayer is entitled but has not received.** Thus, case authorities which discuss taxes measured by "gross receipts" as that term is understood in ordinary English have no application to the so-called "gross receipt" measurement set

forth in Jefferson County Ordinance 1120.

Current experience shows that there is a vast difference between "gross receipts" under the Ordinance and "gross receipts" in ordinary English usage. Since 1981, there have been eight interruptions in federal funding. The last occurred while this case was before the Eleventh Circuit en banc. See "Budget Showdown Threatens Federal Shutdown," Atlanta Journal and Constitution, 9/4/95, p. A5. A suspension in funding could easily have resulted in the Judges in the case at bar performing work which entitled them to compensation one year, but which would have been received in the next year. Moreover, all Judges entitled to a refund of Social Security withholding under *Hatter v. U.S.*, 64 F.3d 647 (Fed.Cir. 1995), would be entitled to compensation in years past which will only be received at a future date. Thus, the taxable event under Ordinance 1120 may occur in one year and the receipt of compensation may occur in another. Clearly, the taxable event is function performed and not the receipt of compensation.

When performance of the judicial function is underway, the Courts and the Judges are not distinct. In this, 28 USC § 132 provides: "Creation and composition of district courts (b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court." Thus, a judge is the Court when performing the judicial service. In the case at bar, the tax purports to be levied on the compensable rendition of services by the Article III judges while they are performing that function in Jefferson County. **The tax does not fall upon them if they are engaged in any of the exempt professions outside the statute; nor does the tax fall upon their receipt of compensation from investments**

or other sources. The tax is directed to what percentage of functions as District Court Judges occur within Jefferson County.

More than a monetary burden is presented. The Article III judges are employees of the United States under the Ordinance. The United States is the employer. The United States cannot, however, be compelled to prorate the compensation due for the employee's services within and without the County and make a return as required by the Ordinance. The Ordinance then throws those time-keeping and return requirements on the employees. The effect is to subject the Article III judges, **at the time they are to be performing the judicial function**, with the onerous record-keeping requirements of the Ordinance, so as to provide a basis for proration of activities inside and outside the County. A tax ordinance which requires Article III judges to maintain detailed time sheets to prorate according to where their functions are performed is an Ordinance which burdens the judicial function itself. Moreover, Section 7 of the Ordinance empowers the taxing authority to visit the judge's offices and rummage through their papers to determine the proper allocation between in-county and out-of-county work.

The burden reaches farther than the mere paperwork required. Under 28 USC § 1404(a), the venue of a civil action may be transferred in the interest of justice or for convenience.¹ Under the Jefferson County Ordinance, however, a transfer into Jefferson County from a Georgia District Court venue carries the inconvenience that a tax will be levied on the compensable services rendered by Georgia attorneys who may try the case and upon the services of the

¹ See also Fed.R.Crim.Proc. 21(a), 18 U.S.C.

judge trying the case -- to the extent that those services are rendered within the County. Thus, with the intrusion of inflicting additional paperwork into the judicial function comes the additional intrusion upon the decision-making process itself. The Eleventh Circuit properly considered the degree of intrusion presented and properly found the judicial function itself to be burdened by the particular requirements of the privilege tax presented. *Jefferson County v. Acker*, 92 F.3d 1561, 1570-1571 (11th Cir. 1996).

As the District Court properly found, Congress would not be not competent to waive the immunity of the judiciary from such intrusion. But that holding is not Eleventh Circuit precedent, for that part of the District Court Opinion has been superseded by the Eleventh Circuit En Banc Opinion, holding that Congress has done nothing which could be construed to have done such a thing.

CONCLUSION

Accordingly, the Eleventh Circuit Opinion presents no disturbance of precedent and no general immunity from income taxes as urged in the unrestrained hyperbole upon which the Petition is based. While the constitutional principles involved are of great importance, there is nothing novel about their application or development. What is presented is simply a tax under which the local governing authority sought to use the term "gross receipts" to fit federal case law and then defined the term in such a peculiar way so that the tax was not on anything **gross** and not on anything **received**. Unless federal authorities are in need of a restatement of the rule that there is no magic in mere nomenclature, no reason appears to grant certiorari. The Petition should be denied.

Respectfully submitted,
Irwin W. Stolz, Jr.
Seaton D. Purdom
Suite 4300, One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
404/577-6000
Attorneys for Respondent

APPENDIX OF RESPONDENT JUDGE

WILLIAM M. ACKER, JR.
CONSTITUTION OF ALABAMA OF 1901
ARTICLE IV LEGISLATIVE DEPARTMENT

§ 105 Special laws; prohibited when general laws applicable.

No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law.

AL CONST Art. 4, § 105

CONSTITUTION OF ALABAMA OF 1901
AMENDMENTS

Amend. No. 25. Article XXII; Income Tax

Article XXII. The legislature shall have the power to levy and collect taxes for state purposes on net incomes from whatever source derived within this state, including the incomes derived from salaries, fees and compensation paid from the state, county, municipality, and any agency or creature thereof, for the calendar year, 1933, and thereafter and to designate and define the incomes to be taxed and to fix the rates of taxes, provided that the rate shall not exceed 5 percent nor 3 percent on corporations. Income shall not be deemed property for purposes of ad valorem taxes. From net income an exemption of not less than fifteen hundred dollars (\$1,500.00) shall be allowed to unmarried persons and an exemption of not less than three thousand dollars (\$3,000.00) shall be allowed to the head of a family, provided that only one exemption shall be allowed to husband and wife where they are living together and make separate returns for income tax. An exemption of not less than three hundred dollars (\$300.00) shall be allowed for each dependent member of the family of an incometax payer under the age of 18 years. The legislature shall reduce the ad valorem tax from time to time when and to such an amount as the revenue derived from the income tax will justify. In the event the legislature levies an income tax, such tax must be levied upon the salaries, income, fees, or other compensation of state, county and municipal officers and employees, on the same basis as such income taxes are levied upon other persons. All income derived from such tax shall be held in trust for the payment of the floating debt of Alabama until all debts due on Oct. 1st, 1932, are paid and thereafter used exclusively for the reduction of state ad valorem taxes.

AL CONST AMEND. No. 25

U.S. Const., Art. III, § 1 [Judicial Power, Tenure of Office]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

28 U.S.C. § 132. Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.

(b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court.

(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

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Fed.R.Crim.Proc. 21(a), 18 U.S.C.

The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

-7a-

FILED IN OFFICE
OCT 6 1998
POLLY CONRAD
CLERK

JOHN E. ROCHESTER
PRESIDING CIRCUIT JUDGE
CLAY AND OOOBA COUNTIES
FORTIETH JUDICIAL CIRCUIT
CLAY COUNTY COURTHOUSE
P. O. BOX 40
ASHLAND, ALABAMA 26251

RONALD O. POPE **MITA B. ANDERSON**
OFFICIAL COURT REPORTER **JUDICIAL ASSISTANT**

September 30, 1998

Mr. William M. Slaughter
Haskell, Slaughter, Young & Johnston
1901 North 6th Avenue
Suite 1200
Birmingham, Alabama 35203

RE: Jason Richards. et al, vs. Jefferson County, et al.
Case No. CV-92-3 191

Dear Bill:

I have reached a decision in the above-styled matter, I will deliver a judgment, along with certain documents, to the Clerk of Court on Friday. November 13, 1998, at 1100 A.M.

-8a-

I would like to meet with you on that day to answer any questions you might have about my order. We will meet in Courtroom 714 at the Criminal Justice Center at 10:00 A. M.

Sincerely yours,

John E. Rochester

cc Hon Wayne Thorn, Presiding Circuit Judge
Polly Conradi Clerk

-9a-

FILED IN OFFICE
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CLERK

JOHN E. ROCHESTER
PRESIDING CIRCUIT JUDGE
CLAY AND OOOBA COUNTIES
FORTIETH JUDICIAL CIRCUIT
CLAY COUNTY COURTHOUSE
P. O. BOX 40
ASHLAND, ALABAMA 26251

RONALD O. POPE MITA B. ANDERSON
OFFICIAL COURT REPORTER JUDICIAL ASSISTANT

September 30, 1998

Mr. Thomas L. Stewart
Gorhara, Waidrep, Stewart, Kendrick & Bryan
Energen Building, Suite 700
2101 6th Avenue North
Birmingham, Alabama 35203

RE: Jason Richards, et al, vs. Jefferson County et al.
Case No. CV-92-3191

Dear Tom:

I have reached a decision in the above-styled matter, I will deliver a judgment, along with certain documents, to the

-10a-

RE: Jason Richards, et al, vs. Jefferson County et al.
Case No. CV-92-3191

Dear Tom:

I have reached a decision in the above-styled matter, I will deliver a judgment, along with certain documents, to the Clerk of Court on Friday, November 13, 1998, at 1100 A.M. I would like to meet with you on that day to answer any questions you might have about my order We will meet in Courtroom 714 at the Criminal Justice Center at 10:00 A. M.

Sincerely yours,

John E. Rochester

cc Hon Wayne Thorn, Presiding Circuit Judge
Polly Conradi Clerk

-11a-

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JOHN E. ROCHESTER
PRESIDING CIRCUIT JUDGE
CLAY AND OOOBA COUNTIES
FORTIETH JUDICIAL CIRCUIT
CLAY COUNTY COURTHOUSE
P. O. BOX 40
ASHLAND, ALABAMA 26251

RONALD O. POPE MITA B. ANDERSON
OFFICIAL COURT REPORTER JUDICIAL ASSISTANT

September 30, 1998

Mr. Edwin A. Strickland
Mr. Jeffrey M. Sewell
214 Jefferson County Courthouse
Birmingham, Alabama 35263

RE: Jason Richards, et al, vs. Jefferson County et al.
Case No. CV-92-3191

Dear Andy and Jeff:

I have reached a decision in the above-styled matter, I will deliver a judgment, along with certain documents, to the Clerk of Court on Friday, November 13, 1998, at 1100 A.M.

-12a-

I would like to meet with you on that day to answer any questions you might have about my order. We will meet in Courtroom 714 at the Criminal Justice Center at 10:00 A. M.

Sincerely yours,

John E. Rochester

cc Hon Wayne Thorn, Presiding Circuit Judge
Polly Conradi Clerk

-13a-

FILED IN OFFICE
OCT 5 1998
POLLY CONRADI
CLERK

JOHN E. ROCHESTER
PRESIDING CIRCUIT JUDGE
CLAY AND OOOBA COUNTIES
FORTIETH JUDICIAL CIRCUIT
CLAY COUNTY COURTHOUSE
P. O. BOX 40
ASHLAND, ALABAMA 26251

RONALD O. POPE MITA B. ANDERSON
OFFICIAL COURT REPORTER JUDICIAL ASSISTANT

September 30, 1998

Mr. William J. Baxley
Mr. Joel Dillard
Baxley, Dillard, Dauphin & McKnight
2008 Third Avenue South
Birmingham, Alabama 35233

RE: Jason Richards, et al, vs. Jefferson County et al.
Case No. CV-92-3191

Dear Bill and Joel:

I have reached a decision in the above-styled matter, I will deliver a judgment, along with certain documents, to the Clerk of Court on Friday, November 13, 1998, at 1100 A.M.

-14a-

I would like to meet with you on that day to answer any questions you might have about my order We will meet in Courtroom 714 at the Criminal Justice Center at 10:00 A. M.

Sincerely yours,

John E. Rochester

cc Hon Wayne Thorn, Presiding Circuit Judge
Polly Conradi Clerk

4

Supreme Court, U. S.
FILED

JAN 21 1999

CLERK

No. 98-10

In The
Supreme Court of the United States
October Term, 1998

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM ACKER and U.W. CLEMON,

Respondents.

On Writ Of Certiorari To The
Eleventh Circuit Court Of Appeals

PETITIONER'S BRIEF ON THE MERITS

EDWIN A. STRICKLAND
JEFFREY M. SEWELL*
Jefferson County Attorney's Office
A-610 Courthouse Annex
716 North 21st Street
Birmingham, AL 35263
(205) 325-5688

* *Counsel of Record*

4788

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court had subject matter jurisdiction over this action in light of the Tax Injunction Act.
2. Whether a county privilege/occupational tax levied upon the pay or compensation of an Article III judge violates the Supremacy Clause.

**PARTIES TO THE PROCEEDINGS BELOW
AND CERTIFICATE OF INTERESTED PERSONS**

Petitioner	Jefferson County, Alabama
Petitioner's Counsel	Edwin A. Strickland Jeffrey M. Sewell
Respondents	William Acker U.W. Clemon
Respondents' Counsel	Irwin Stolz Seaton Purdhum Alan B. Morrison
Trial Judge	Honorable Charles A. Moye, Jr., Senior United States District Judge
En Banc Eleventh Circuit Court of Appeals	Hon. Gerald Bard Tjoflat Hon. Phyllis A. Kravitch Hon. Joseph W. Hatchett Hon. R. Lanier Anderson, III Hon. J.L. Edmondson Hon. Emmett R. Cox Hon. Stanley F. Birch, Jr. Hon. Joel F. Dubina Hon. Susan H. Black Hon. Ed Carnes Hon. Rosemary Barkett Hon. Albert J. Henderson

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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CITATIONS OF THE OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW

The opinions and judgments entered in the courts below are contained in the appendix to the petition.

STATEMENT FOR BASIS OF JURISDICTION

This is an appeal from an en banc decision of the United States Court of Appeals for the Eleventh Circuit. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

- (i) Date of en banc judgment: March 27, 1998.
- (ii) Certiorari granted December 7, 1998.
- (iii) Jurisdiction is conferred by 28 U.S.C. § 1254(1) and Rule 10(c) of this Court's rules.

STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE

The provisions involved are lengthy. Only their citations are provided below. The verbatim text is contained in the appendix to the petition.

- i. The supremacy clause, Article VI, United States Constitution. (Appendix to Petition, p. 118)
- ii. The Buck Act, 4 U.S.C. §§ 106-110. (Appendix to Petition, pp. 119-120)
- iii. The Public Salary Act, 4 U.S.C. § 111. (Appendix to Petition, p. 121)
- iv. 5 U.S.C. § 5520. (Appendix to Petition, pp. 122-124)

- v. 31 CFR § 215.2. (Appendix to Petition, p. 125)
- vi. Alabama Act 406 (1967). (Appendix to Petition, pp. 126-128)
- vii. Jefferson County, Alabama Ordinance No. 1120. (Appendix to Petition, pp. 128-139)
- viii. The Alabama State Business License Code, §§ 40-12-1, *et seq.*, Alabama Code (1975). (Appendix to Petition, pp. 140-175)

STATEMENT OF THE CASE

(I) Nature of Case, Course of Proceedings and Disposition.

William Acker and U.W. Clemon are Article III judges in the Northern District of Alabama. They refused to pay the county's occupational tax which was authorized by Alabama Act 406 (1967) [hereafter "Act 406"] and implemented by County Ordinance 1120, effective January 1, 1988. (Act and Ordinance in Appendix to Petition) The occupational tax is levied at the rate of one-half of one percent (.005%) on the gross receipts earned in the geographic boundary of the county by individuals who are not required to purchase a state business license pursuant to the state business license code codified at §§ 40-12-1 *et seq.*, Ala. Code (1975). The occupational tax is collected from hundreds of thousands of persons who work in the county including federal, state and local government employees.

The county filed suit against the judges in the state small claims court. The judges removed the cases to the

United States District Court for the Northern District of Alabama.¹ The cases were consolidated and specially assigned to the Honorable Charles A. Moye, Jr., Senior District Judge, from the State of Georgia. As the case involved only questions of law and since the material facts were undisputed, it was submitted to the trial court on stipulated facts and cross motions for summary judgment. The trial court entered a final order denying the county's motion for summary judgment and granting the judges' motions for summary judgment. The trial court held that, as applied to federal judges, the county occupational tax is a "franchise tax imposed upon the federal judiciary operations and is unconstitutional as a direct tax upon an officer and instrumentality of the United States, that is, upon the sovereign itself." 800 F.Supp. at 1545, 46. The trial court also held that the county occupational tax "constitutes an unconstitutional diminution of the defendants' compensation and is invalid as to them." 805 F.Supp. at 1548. (Trial court opinion in Appendix to Petition, pp. 82-116)

The county appealed. The case was assigned to a three judge panel of the Eleventh Circuit Court of Appeals. After briefing and oral argument the panel reversed the trial court and held the levy of the tax on the judges' compensation did not violate the Supremacy clause or the Compensation clause of the United States Constitution and remanded the case for determination of the amount of tax owed. 61 F.3d 848.

¹ The county moved to remand the case for lack of jurisdiction on the basis of the Tax Injunction Act. The trial court denied the motion. Motion and order at [R-1-6-1 and R-1-12-1].

The court of appeals granted en banc rehearing. 73 F.3d 1066. After rebriefing and oral argument, the divided² court of appeals held that the county tax on federal judges is a direct tax on the federal government in violation of the intergovernmental tax immunity doctrine. 92 F.3d 1561. In affirming the trial court, the court of appeals declined to reach the Compensation clause issue. (First court of appeals opinion in Appendix to Petition, pp. 26-81)

The county filed a petition for certiorari. This Court requested the United States to file an *amicus* brief. The Attorney General and Solicitor General filed an *amicus* brief urging this Court to grant the petition and reverse the court of appeals.³ The Attorney General and Solicitor General also suggested that this Court examine federal jurisdiction. (*Amicus* brief in Appendix to Petition, pp. 176-196) This Court granted the petition, vacated the court of appeals decision and remanded the case for consideration of jurisdiction in light of *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997).

After rebriefing and without oral argument, the court of appeals entered a supplemental opinion distinguishing this case from *Arkansas v. Farm Credit* by holding that federal judges more closely resemble Indian tribes and federal reserve banks than production credit associations. The court of appeals held the judges may utilize the

² En banc 9 judges to 3 judges.

³ The *amicus* brief is reproduced in the appendix to the Petition at 176-196.

judicial exception to the Tax Injunction Act notwithstanding the absence of the United States as a party. Having found federal jurisdiction, the court of appeals reinstated its prior en banc opinion, this time with an additional dissenting judge. (Second court of appeals opinion in Appendix to Petition, pp. 1-25) This appeal followed. This Court granted certiorari on December 7, 1998.

(II) Stipulated Facts

The undisputed material facts were stipulated by the parties before the district court and on appeal as follows:

1. Alabama Act 406 (1967) authorizes Jefferson County, Alabama, to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay a privilege, license or occupational tax to the State of Alabama.

2. In 1987, the Jefferson County Commission, the governing body of the county, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the county not required by state law to pay a privilege, license or occupational tax to the state.

Section 2 of Jefferson County Ordinance No. 1120 provides:

[i]t shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the county . . . without paying license fees for the privilege of engaging

in or following such vocation, occupation, calling or profession . . .

Section 1, Definitions, subsection (C), provides:

[t]he words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

3. The effective date of the ordinance was January 1, 1988. The county occupational tax is measured at the rate of one-half of one percent (.005) of the gross receipts earned within the geographic boundary of Jefferson County, Alabama.

4. At all times since January 1, 1988, defendants have been employed by the United States of America as District Judges for the Northern District of Alabama pursuant to Article III of the Constitution of the United States.

5. The Northern District of Alabama is composed of 31 counties, including Jefferson County.

6. Defendants maintained their principal offices at the Hugo Black Federal Courthouse in the city of Birmingham, Jefferson County, Alabama.

7. Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama.

8. Ordinance No. 1120, section 3, provides:

[i]n cases where compensation is earned as a result of work done or services performed both

within and without the County, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Since the effective date, neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama, has ever made an oath certifying the alleged amounts of a federal judge's salary earned within and without Jefferson County.

9. Defendants are not required by any state law to pay any privilege, license or occupational tax to the State of Alabama. Defendants, however, still pay their dues (one-half of the dues of a licensed practicing attorney) to the Alabama State Bar, which is an integrated bar, and, as such, is an arm or agency of the State of Alabama. Although defendants are not and cannot be licensed to practice law, they remain sustaining or auxiliary members of the bar as they still pay their dues.

10. The Administrative Office of the United States Courts has never withheld county occupational tax from any federal judge or court employee pursuant to the provisions of Ordinance No. 1120.

11. All active judges of the Northern District of Alabama except defendants have paid the county occupational tax on differing percentages of their judicial salaries to Jefferson County without supporting those percentages by an oath or by any formal accounting

procedure. At least one Article III judge (not a defendant) has paid "under protest".

12. All State District and Circuit Court Judges of the Tenth Judicial Circuit of Alabama have paid the county occupational tax. The three Alabama Supreme Court Justices with satellite offices in Jefferson County have paid the county occupational tax based on portions of their salaries.

13. The Honorable Robert S. Vance, United States Circuit Judge, who served on the Court of Appeals for the Eleventh Circuit, and who, from January 1, 1988 until his death, had chambers in Jefferson County, Alabama, where he resided and spent most of his time, never paid the county occupational tax.

14. Since 1970, the city of Birmingham, Alabama, has imposed an occupational tax at the rate of one percent of gross receipts (twice the rate of the county tax) on persons engaged in any vocation, occupation, calling or profession within the city.

15. All active judges of the Northern District of Alabama except defendant Acker have paid the city occupational tax.

16. Defendant Clemon has paid the City Occupational Tax on approximately 66 percent of his gross earnings during his entire tenure as a United States District Judge.

17. Since 1962, the City of Gadsden, Alabama, where defendant Acker has regularly held court for the last 11 years, has had an occupational tax ordinance similar to the county occupational tax, except that it

contains no exemptions. The Gadsden ordinance provides in pertinent part:

[i]t shall be unlawful for any person to engage in or follow any trade, occupation or profession, as defined in this article, within the city on and after the first day of February, 1962, without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by two (2) per cent of the gross receipts of each such person.

Gadsden, City Code, Section 7-51.

18. The city of Gadsden has made no effort to exact or to collect a license fee from any of the several Article III judges who, regularly, have sat in the Middle Division of the Northern District of Alabama, which has its courthouse in the city of Gadsden.

19. Defendants have paid their Alabama state income taxes throughout their tenures as federal judges.

20. A final decree entered by defendant Acker as an Article III judge after January 1, 1988, has been formally attacked under Rule 60(b), Fed.R.Civ.P., as having been "unlawfully" entered because said order was entered by defendant Acker when he had not paid his license fee to Jefferson County pursuant to Ordinance No. 1120.

SUMMARY OF THE ARGUMENT

ISSUE I – JURISDICTION

The County acknowledges agreement with *some* of the court of appeals' conclusions about the application of the Tax Injunction Act, 28 U.S.C. § 1341 [hereafter "TIA"] to this case. The court of appeals correctly found at part II, section B of its opinion that the TIA applies to this case; that the Alabama Declaratory Judgment Act, §§ 6-6-220 *et seq.*, Alabama Code (1975), provides the judges with a plain, speedy and efficient remedy to assert their constitutional and other objections to the tax as affirmative defenses in their answer in the state court suit; that the statutory exception to the TIA is therefore unavailable; and, that the federal officer removal statute, 28 U.S.C. § 1442, does not override the TIA.⁴ The county believes each of the foregoing conclusions are correct for the reasons set forth in the court of appeals' opinion. We will not waste space or time dwelling on those portions of the lower court opinion which contain no error. Instead, we focus on the court of appeals' erroneous application of the judicial exception to the Tax Injunction Act in this case.

Unless an exception applies, the TIA operates to bar federal jurisdiction over this case. The statutory exception to the TIA is not available because Alabama provides the judges with a plain, speedy and efficient remedy where

⁴ Holding that the federal officer removal statute overrides the TIA would be the logical equivalent of holding that the diversity and federal question statutes also override the TIA thereby leaving it no field of operation.

their constitutional and other objections to the tax may be presented. The judicial exception to the TIA should not be available because the United States is not a co-party as required by *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997) and *Department of Employment v. United States*, 385 U.S. 355 (1966).

There are numerous reasons why the Court should apply the same requirement (i.e., that the United States be a co-party) to federal employees as the Court requires for federal instrumentalities. First, the requirement prevents instrumentalities from evading *Arkansas v. Farm Credit Services* by simply suing in the name of an employee without the United States. Second, it requires federal employees to seek the services of instead of bypassing and ignoring the Attorney General. Third, the requirement maintains the narrow construction of the judicial exception which this Court has insisted upon in earlier decisions. Fourth, it thereby protects the integrity of the TIA. Fifth, requiring the United States to be a co-party prevents federal employees from picking and choosing when they stand in the shoes of the government for purposes of tax avoidance as the judges are trying to do in this case. The county urges the Court to reverse the court of appeals' reckless expansion of the judicial exception and hold that the judicial exception is not available to federal employees who litigate with state taxing authorities unless the United States is a co-party.

ISSUE II – MERITS

The Public Salary Tax Act, 4 U.S.C. § 111 [hereafter "PSTA"] and the Buck Act, 4 U.S.C. §§ 106, *et seq.*, waive

the judges' immunity from the county tax. The tax falls within the PSTA because it does not discriminate against the judges on account of the source of their pay or compensation. The tax also falls within the Buck Act because it is measured by gross receipts. Because Congress has waived the judges' immunity from this tax, Supremacy clause and tax immunity violations are not possible.

ARGUMENT

I. WHETHER THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION IN LIGHT OF THE TAX INJUNCTION ACT

A. The Tax Injunction Act and its Exceptions

1. The Act

The TIA provides:

The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

Id.

In *California v. Grace Brethren Church*, 457 U.S. 393 (1982), this Court described the TIA's purpose as "limiting drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." 457 U.S. at 408, 409. In *Grace Brethren* this Court also held the TIA prevents a district court "from issuing a declaratory judgment holding state tax laws unconstitutional." 457 U.S. at 408. This Court and the federal courts

of appeal have consistently held that the TIA "eliminated federal jurisdiction over all cases – including tax enforcement actions – in which an inquiry into the validity of a state or local tax is necessary to afford one of the parties a complete defense." See *Keleher v. New England Telephone and Telegraph Company*, 947 F.2d 547 (2nd Cir. 1991); *Hardwick v. Cuomo*, 891 F.2d 1097 (3rd Cir. 1989); *City of Burbank v. State of Nevada*, 658 F.2d 708 (9th Cir. 1981). Since an inquiry into the validity of the county tax is necessary to afford the judges a defense, and since that defense resulted in the trial court's declaratory judgment that the county tax, as applied to judges, violated the Supremacy clause, it follows that the TIA was triggered and barred federal jurisdiction unless an exception applied.⁵

2. The Exceptions

There are two exceptions to the TIA:

- (a) The statutory exception, and
- (b) The judicial exception.

(a) Statutory Exception

The statute permits federal jurisdiction only where there is no plain, speedy and efficient state court remedy. In *Grace Brethren*, this Court held that the statutory exception must be construed narrowly. 457 U.S. at 413. The test is whether Alabama provides the defendant judges with

⁵ That is why the county moved to remand the case to state court at the outset. But, the trial court denied the motion. See Motion to Remand and Order at [R-1-6-1 and R-1-12-1].

some opportunity to raise their constitutional objections. *Rosewell v. Lasalle National Bank*, 450 U.S. 503 (1980).

At Part II, Section B(1), page 1949 of its opinion, the court of appeals correctly found that Alabama provides the judges with a plain, speedy and efficient remedy. The Alabama Declaratory Judgment Act, §§ 6-6-220, *et seq.*, Alabama Code (1975), permits the judges to assert their constitutional and other objections to the tax as affirmative defenses in their answer in the state court suit and to litigate those issues in the state court proceeding. The court of appeals correctly noted that the judges have never contested the sufficiency of the Alabama remedy. The court of appeals also noted that it had previously held that the Alabama declaratory judgment act provided a plain, speedy and efficient remedy to challenge the very tax at issue in this case. See *Richards v. Jefferson County*, 983 F.2d 237 (11th Cir. 1992) (dismissing a constitutional challenge to the county tax for lack of federal jurisdiction pursuant to the TIA).⁶ Since Alabama provides the judges

⁶ A Westlaw query revealed 225 reported decisions of the Alabama appellate courts where the Alabama Declaratory Judgment Act was utilized by taxpayers to challenge the constitutionality of various state taxes. Some of those cases are as follows: *Thompson v. Chilton County*, 236 Ala. 142, 181 So. 701 (1938) (a taxpayer may sue under the Declaratory Judgment Act to prevent unconstitutional use of funds by County); *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988) (declaration that the Jefferson County occupational tax is constitutional); *Sizemore v. Rinehart*, 611 So.2d 1064 (Ala. Civ. App. 1992) (declaration that state income tax on retirement benefits received by military retirees while, at the same time exempting benefits received by state retirees, violated the Public Salary Tax Act and the United States Constitution; twenty million dollar

with a plain, speedy and efficient remedy, it is axiomatic that the statutory exception to the Act is not available.

(b) Judicial Exception

The judicial exception was established by this Court in *Department of Employment v. United States*, 385 U.S. 355 (1966), holding that "the TIA does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." 385 U.S. at 358. After *Department of Employment* was released, the courts of appeal split over whether federal instrumentalities could contest state taxes in federal court without the government as a co-party. This Court resolved that split in *Arkansas v. Farm Credit Services*, 520 U.S. 801 (1997) by holding that the judicial exception was available to an instrumentality such as a production credit association (PCA) only if the United States government was an actual party in the suit.

retroactive refund of state income tax to federal retirees ordered); *Concerned Citizens of Fairfield v. City of Fairfield*, 718 So.2d 1140 (Ala. Civ. App. 1998) (declaratory judgment that municipal garbage collection fee was unconstitutional); *Melof v. James*, 1998 WL 227965 (Ala. Civ. App. May 8, 1998) (declaratory in taxpayer class action that the state's classification of retirement benefits for state income tax purposes did not violate the federal equal protection clause); *Howell Lumber Company v. City of Tuscaloosa*, 1997 WL 139499 (Ala. Civ. App.) (declaratory judgment that levy of municipal business license tax on business outside corporate limits was constitutional).

B. This Case

This case presents the question of whether the U.S. government must also be a co-party with a federal employee who seeks to invoke the judicial exception to the TIA. That is, does the bright line test established in *Arkansas v. Farm Credit* also apply to federal employees?⁷ We believe that question must be answered in the affirmative for a number of reasons.

First, instead of applying the test of *Arkansas v. Farm Credit Services* and holding that because the United States is not a co-party the judicial exception is not available, the court of appeals came up with a new test. That new test treats the employee as an instrumentality and then compares the employee to the PCA in *Arkansas v. Farm Credit Services* and the Indian tribe in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (holding that a special jurisdictional statute gives Native American tribes special access to the federal courts embodying a congressional purpose to let tribes sue in federal court as though they were the United States) and the federal reserve bank in *Federal Reserve Bank v. Commissioner of Corps and Taxation*, 499 F.2d 60 (1st Cir. 1974) (also holding that a special jurisdictional statute embodies a congressional purpose to allow the federal reserve to sue in federal court as though it were the United States) to determine whether the employee is closer to a PCA, an Indian tribe or a

⁷ When receiving income for services rendered the United States judges Acker and Clemon are no different from any other federal employee. As such, their salaries are subject to a number of employment taxes including the federal income tax, FICA, state income tax, etc.

federal reserve bank. That tortured analysis results in the court of appeals finding that a federal employee is closer to an Indian tribe and a federal reserve bank than a production credit association (PCA). Of course, the transparent purpose of that exercise is to evade *Arkansas v. Farm Credit Services* by merely allowing the employee to sue in place of the instrumentality. The only way to stop such gamesmanship is to require that, for the judicial exception to apply, the United States itself must be a party along with the employee. If for example the United States sues in federal court on behalf of the Internal Revenue Service to have a state tax lien voided, it is clear that the judicial exception ought to apply and federal jurisdiction should exist. It is also clear that if John Doe, an employee of the IRS, sues in federal court to escape a state tax on his pay or compensation without the United States as a co-party, the judicial exception ought not apply. Likewise, if the United States sues in federal court on behalf of the judicial department to enjoin the levy of state property tax on a federal courthouse, it is clear that the judicial exception ought to apply and federal jurisdiction ought to exist. But, if an employee who works in that courthouse sues in federal court to escape payment of a state or local tax on pay or compensation without the United States as a co-party, it is clear that the judicial exception should not apply. A bright line test requiring the presence of the United States as a co-party maintains the scope of the judicial exception to suits involving only the United States itself. Such a bright line requirement also prevents the lower courts from blurring the distinctions between the United States and its employees with regard to the levy of state and local taxes. The PCA in the

Arkansas v. Farm Credit Service case was not the United States. Likewise, Judges Acker and Clemon are not the United States; they are employees of the United States when they receive income for services rendered to their employer. There are obvious distinctions between the United States and its employees with regard to state taxation. As fully discussed at issue II below *this Court and Congress created those distinctions*. As example, Congress created a distinction between the United States and its employees by consenting to the state and local taxation of the employees' pay or compensation. Since 1938 this Court has distinguished between the United States and its employees in the application of the doctrine of intergovernmental tax immunity. *Davis v. Michigan Dep't of Treasury* and *United States v. New Mexico* and *Graves v. New York* all hold that the doctrine immunizes only the United States and not its employees. There is no reason to depart from those distinctions in this case by now holding that there is no distinction between a federal employee and the United States with regard to liability for state and local taxes. The fact that these employees are also judges is interesting but adds nothing to the analysis.

Second, the court of appeals' opinion encourages federal employees to bypass and ignore the Attorney General. This case illustrates the illogical result of that behavior. The judges are permitted to litigate, speak for and stand in the shoes of the United States while, at the same time, *advancing a position in direct conflict with that expressed by the United States*. This has several undesirable consequences. It neuters the function of the Attorney General. It allows the United States to speak with multiple voices which makes it difficult if not impossible for a

Court to determine the United States' true position. And, it allows federal employees and agencies to "shoot at" each other in a federal courtroom. All of those consequences are avoided by requiring the United States as a party if the judicial exception is to be available to a federal employee.

Third, by blurring the distinction between the United States and its employees and by allowing the employees to litigate in federal court without the United States, the judicial exception is enormously expanded. That would amount to a reversal of course on every prior decision of this Court pertaining to the levy of state or local tax on the pay or compensation of a federal employee. In *Arkansas v. Farm Credit Services*, the Court cautioned lower courts to limit rather than expand the judicial exception to the TIA stating: "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text." 117 S.Ct. at 1780. In *Grace Brethren* the Court stated: "exceptions from the TIA must be construed narrowly" 457 U.S. at 413. It is reckless and unnecessary to reverse course and expand the judicial exception to a point that it defeats the purpose of TIA. That would be the result if the Court concluded that federal employees could litigate with state taxing authorities without the United States. The TIA would be meaningless.

Fourth, of the universe of potential plaintiffs, those who can claim an employment connection with the federal government have historically had the best chance of evading a state or local tax. It is significant that at the time the TIA was enacted in 1937 the doctrine of intergovernmental tax immunity was at its zenith. In 1937 the

persons most likely to litigate with a state taxing authority were those with some employment connection to the federal government. Many of this Court's reported decisions on the subject involve an employee trying to avoid a state or local tax by claiming that he or she stood in the shoes of the United States and that the tax interfered with or burdened the federal government (i.e., trying to blur the distinction between the employee and the United States as is being attempted in this case). It is reasonable and likely that those are the very persons Congress intended to reach with the TIA. That is, Congress intended to stop them from using the federal courts to evade state taxation of their pay *unless the United States would join them as a party*. Allowing them to litigate without the United States defeats that central purpose of the TIA.

Fifth, allowing federal employees to litigate with state taxing authorities without the United States as a co-party allows them to pick and choose when they stand in the shoes of the government for purposes of tax avoidance. This case illustrates how that game is played. Both judges admitted in their interrogatory answers that they, as federal judges, are subject to the Alabama state income tax.⁸ That means they are distinguishable from the United States for state income tax purposes. If they are distinguishable for state income tax purposes it follows they

⁸ Interrogatory 12 – Do you agree that federal judges of the Northern District of Alabama who work and reside in the state of Alabama are subject to the Alabama income tax?

Response – Yes. (See answers to interrogatories collectively assembled by district court clerk at R1-18)

are distinguishable for local tax purposes. Conversely, if the judges really are the United States it follows they are not subject to *any* tax. By admitting liability for *some* state taxes the judges reveal what they are really doing. They are picking and choosing when they stand in the shoes of the United States for purposes of tax avoidance. That is illustrated by Judge Clemon's behavior. He refuses to pay the county tax but it is undisputed that, since he was appointed a federal judge, he has paid without question an identical occupational tax to the city of Birmingham *at twice the rate of the county tax!* [R-1-34-37]. This Court should not interpret the judicial exception to the TIA in a manner that allows a federal employee to pick and choose which taxes he or she will pay.

The Court should reverse the court of appeals and hold that the judicial exception is available to a federal employee *only* when the United States itself is a co-party. This case should be remanded to state court for lack of federal jurisdiction.

II. WHETHER A COUNTY PRIVILEGE/OCCUPATIONAL TAX LEVIED ON THE PAY OR COMPENSATION OF AN ARTICLE III JUDGE VIOLATES THE SUPREMACY CLAUSE.

A. Origin and Rise of Doctrine of Intergovernmental Tax Immunity

The doctrine of federal immunity from state taxation originated in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), where this Court invalidated a state tax on the Bank of the United States. From 1819 until the 1930's the doctrine was expanded by the federal courts. At its zenith

in 1937 the doctrine immunized all federal officers, employees, and contractors from state and local taxation. The doctrine was a two way street which also immunized all state and local employees and officials from federal taxation. See *Dobbins v. Commissioners*, 41 U.S. (16 Pet.) 435 (1842); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870).

B. Fall of the Doctrine

In the 1930's this Court and Congress began to dismantle the doctrine.

1. Judicial Dismantling

In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), this Court declined to follow the *Dobbins/Day* line of cases and implicitly overruled *Collector v. Day* by holding that state employees of the New York Port Authority were subject to the federal income tax. One year later, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), this Court expressly overruled the entire line of cases from *Dobbins* to *Day*. An insightful explanation of this Court's rationale for dismantling the doctrine is found in the special concurrence of Justice Frankfurter in *Graves v. New York*:

The arguments upon which *McCulloch v. Maryland* rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion *McCulloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency

to the phrase that 'the power to tax is the power to destroy.' This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch v. Maryland*. The seductive cliché that the power to tax is the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely, the doctrine that their immunities are correlative - because the existence of the national government implies immunities from state taxation, the existence of the state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent, the force of which gathered rather than lost strength with time:

I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of state governments as it has of taxing its own officers. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult to control. Where are we to stop in enumerating the functions of the state governments which will be interfered with by federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a

fallacy and that it will lead to mischievous consequences.

All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions'.

In a series of cases from 1938 to present this Court further dismantled the doctrine and restored federal officers, employees and contractors to state and local tax rolls. *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982) (federal contractors required to pay New Mexico gross receipts tax for privilege of doing business with federal government in the state); *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977) (employees of US Forest service required to pay California property tax on homes located on federal land and provided to employee as part of compensation); *Howard v. Commissioners*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953) (civilian employees of Navy working on military base required to pay municipal occupational tax to city of Louisville); *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed.2d 3 (1941) (federal contractors required to pay Alabama sales tax on sales to federal government); *Graves v. New York*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed.2d 927 (1939) (employees of federal instrumentality required to pay New York state income tax); *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed.2d 155 (1937) (federal contractor required to pay West Virginia gross receipts tax for privilege of doing business with federal government in the state).

In each of the foregoing cases the federal officers, employees or contractors unsuccessfully advanced the

same arguments made by the judges in this case (i.e., that they stand in the shoes of the United States and the tax interfered with or burdened their federal functions and duties). In each case this Court rejected that argument. In *Graves v. New York* this Court observed:

The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable.

306 U.S. at 480.

Though Justice Stone was discussing the New York tax levied on the privilege of working in that state, he may just as well have been describing the county's occupational tax. The county tax is measured by income. It is imposed in a non-discriminatory manner upon the salaries of all judges, state and federal,⁹ as well as hundreds

⁹ It is undisputed that the tax is levied on all state and federal judges and is paid by all 27 state judges within Jefferson County, Alabama and by three Alabama Supreme Court Justices who have satellite offices in the county. (R1-34-36) Further, it is undisputed that all of the federal judges in the Northern District

of thousands of other federal, state, municipal and private sector wage earners in the county. The tax is not levied in form or substance on the United States. It is not paid with government funds. It is paid by the judges with monies they receive as compensation for their services.

In *United States v. New Mexico*, this Court held that the doctrine is not violated even where the entire economic burden is shouldered by the federal government:

. . . [T]ax immunity is appropriate in *only one circumstance*: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot be realistically viewed as separate entities. . . .

455 U.S. at 735.

. . . [I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the federal government shoulders the entire burden of the levy.

* * *

Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the government. And where a use tax is involved, immunity cannot be conferred simply because the

of Alabama (except Defendants) have paid the county tax. Moreover, it is undisputed that all of the federal judges in the Northern District of Alabama (except Acker) including Defendant Clemon have paid an identical occupational tax to the city of Birmingham without question since their respective appointments to the bench. The city tax is twice the rate of the county tax! (R1-34-37)

state is levying the tax on the use of federal property in private hands. . . . Indeed, immunity cannot be conferred simply because the tax is paid with government funds.

455 U.S. at 734, 35.

In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court described the modern status of the doctrine as follows:

After *Graves v. New York*, intergovernmental tax immunity barred only those taxes that were imposed *directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt*. [Emphasis added]

489 U.S. at 811.

2. Congressional Dismantling

The Public Salary Tax Act and the Buck Act waive and extinguish whatever tax immunity federal officers and employees formerly enjoyed.

a. The Public Salary Act (hereinafter "PSTA")

The PSTA, 4 U.S.C. § 111 provides:

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of

one or more of the foregoing, by a duly constituted taxing authority, having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation. [emphasis added]

Id.

The PSTA was debated and enacted by Congress in 1937 just before this Court began the process of narrowing, and ultimately abandoning, the *Dobbins/Day* line of cases. By enacting the PSTA Congress expressly consented to the non-discriminatory state taxation of the pay or compensation of federal officers and employees. See H. Rep. No. 26, 76 Cong., First Sess. (1939); S. Rep. No. 112, 76 Cong., First Sess. (1939). Just before the PSTA was signed into law this Court released *Graves v. New York*, so the practical effect of the PSTA was to codify the intervening result in *Graves* and, as this Court described in *Davis v. Michigan Dept. of Treasury*, to "thereby foreclose the possibility that subsequent judicial reconsideration of [Graves] might re-establish the broader interpretation of the immunity doctrine." 489 U.S. at 812. Clearly, the purpose of the PSTA is to *abandon*, not preserve or extend, the immunity of federal officers and employees from non-discriminatory state taxation. That conclusion was succinctly stated by this Court in *Davis v. Michigan Dept. of Treasury* as follows:

. . . [t]he overall meaning of section 111 [the PSTA] is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits and other forms of compensation paid on account of their employment with the federal government, *except to the*

extent that such taxation discriminates on account of the source of the compensation. [emphasis added]

489 U.S. at 810.

b. The Buck Act

The Buck Act, 4 U.S.C. § 106(a) provides:

No person shall be relieved from liability for any *income tax*¹⁰ levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area, or receiving income from transactions occurring or services performed in such area; and *receiving income from transactions occurring or services performed in such area*; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax within federal area within such state to the same extent and with the same extent as though such area was not a federal area.

Id.

Examination of the Senate Report on the Buck Act definition of the term "income tax" reveals that Congress deliberately chose a broad definition to include local privilege license taxes and occupational taxes. Moreover, the Senate Report confirms that Congress specifically intended that a local tax be treated as an "income tax" for

¹⁰ The term "income tax" is defined at 4 U.S.C. § 110(c) as: The term "income tax" means any tax levied on, with respect to or measured by, net income, gross income or gross receipts.

purposes of the Buck Act despite being denominated as a privilege license tax under state law:

[t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different state laws. The intent of your committee in laying down such a broad definition was to include therein any state tax (whether known as a corporate-franchise tax, or *business privilege tax*, or *any other name*) if it is levied on, with respect to or *measured* by net income, gross income or *gross receipts*.

* * *

The Buck Act "income tax" broadly defined as it is, refers to the broad, generic class of taxes upon income. *It does not require that the tax be denominated an income tax or that it conform to the federal income tax.* If the tax in question is based upon income and is *measured* by that income in money or monies worth, if a net income tax, gross income tax or *gross receipts* tax, it is an "income tax".

Report of Senate Finance Committee, as quoted in *Humble Oil and Refining Company v. Calvert*, 478 S.W.2d 926, cert. denied, 93 S.Ct. 293, 409 U.S. 967, 34 L.Ed.2d 234 (1972).

c. 5 U.S.C. § 5520

5 U.S.C. § 5520 requires the secretary of the treasury to withhold local taxes from federal employees, as follows:

(a) When a county or city ordinance -

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sum to a designated city or county officer, department or instrumentality and

(2) imposes the duty of withholding generally on the payment of compensation earned within the jurisdiction of the city or county in the case of employees whose regular place of employment is within such jurisdiction.

The secretary of the treasury, under regulations prescribed by the President,¹¹ shall enter into an

¹¹ By executive order at 31 C.F.R. § 215.2, the President has directed that *all elements of the judicial branch* are subject to withholding of city and County license or privilege taxes:

(a) "Agency" means each of the executive agencies and the military departments (as defined in 5 U.S.C. § 105 and 102 respectively) and the United States Postal Service and in addition for city or county withholding purposes only *all elements of the judicial branch*.

* * *

(f) "County income or employment taxes" means *any form of tax* for which, under a county ordinance

(1) Collection is provided by imposing on employers generally the duty of withholding sums from the pay of employees and making return of the sums to a designated county officer, department or instrumentality, and;

agreement with the city or county within 120 days of a request for agreement by the proper city or county official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the city or county ordinance in the case of any employee of the *agency* who is subject to the tax and (i) whose regular place of federal employment is within the jurisdiction of the city or county with which the agreement is made or (ii) is a resident of such city or county.

* * *

(c) For the purpose of this section

(4) "Agency" means -

- (a) An executive agency;
- (b) The *judicial branch*; and
- (c) The United States Postal Service.

Id.

Nothing in 5 U.S.C. § 5520 or 31 CFR § 215.2 exempts federal judges from the withholding requirements contained therein. On the contrary, the language is unambiguous and the term "judicial branch" is obviously inclusive and not exclusive.

(2) The duty to withhold generally is imposed on the payment of compensation earned within the jurisdiction of the County in the case of an employee whose regular place of employment is within such jurisdiction. *Whether the tax is described as an income tax, wage, payroll, earnings, occupational license or otherwise is immaterial.*

31 CFR § 215.2

C. THE CORRECT TESTS THE COURT OF APPEALS SHOULD HAVE APPLIED

1. The correct test to determine whether a state tax falls within the consent of the PSTA is found in the statute itself. Does the county tax discriminate against the judges because of the source of their pay or compensation?

2. The correct test to determine whether a state tax falls within the consent of the Buck Act is whether it is an "income tax" as defined in the Act (i.e., under *federal*, not state law). Is the county tax levied on, with respect to or measured by, net income, gross income or gross receipts?

3. The correct test to determine whether the county tax violates the modern doctrine of intergovernmental tax immunity is whether it is levied directly on the United States itself. *Davis v. Michigan Dept. of Treasury*.

D. APPLICATION OF THE CORRECT TESTS TO THE UNDISPUTED EVIDENCE IN THIS CASE

1. The PSTA:

QUESTION: DOES THE TAX DISCRIMINATE AGAINST THE JUDGES BECAUSE OF THE SOURCE OF THEIR PAY OR COMPENSATION?

ANSWER: NO.

The judges have presented no evidence that the tax discriminates against them on account of the source of their pay. Instead, the evidence is undisputed that the tax is paid by all 27 state court judges located in the county

and by the three Alabama Supreme Court Justices who have satellite offices in the county. [R1-34-36] It is undisputed that all of the federal judges in the Northern District of Alabama (except Acker and Clemon) have paid the county tax. It is also undisputed that all of the federal judges in the Northern District of Alabama (except Defendant Acker), including Defendant Clemon, have paid an identical occupational tax to the city of Birmingham without question since their respective appointments to the bench, and the city tax is twice the rate of the county tax. [R1-34-37] The evidence is undisputed that the tax is imposed in a non-discriminatory manner upon the salaries of all judges, state and federal, as well as hundreds of thousands of others who earn wages in the county.

In their panel and en banc briefs to the court of appeals the judges made an argument of wrongful discrimination comparing federal judges with lawyers for a discriminatory treatment analysis instead of comparing federal judges with state judges. Federal judges cannot be compared with lawyers because federal judges are prohibited from practicing law. Title 28, Section 454, United States Code, makes it a crime for a federal judge to "engage in the practice of law":

Practice of law by justices and judges.

Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.

For discriminatory treatment analysis federal judges should be compared with state judges. For purposes of the PSTA state and federal judges are identically situated. They are treated in an identical manner under the county

tax. That satisfies the only test in the PSTA. Exempting federal judges from a tax the state judges are required to pay is the reverse of discrimination: it is favoritism.¹²

2. The Buck Act:

QUESTION: IS THE COUNTY TAX LEVIED ON, WITH RESPECT TO OR MEASURED BY, NET INCOME, GROSS INCOME OR GROSS RECEIPTS?

ANSWER: YES.

¹² The judges' argument also ignored the fact that Alabama state court judges are forbidden from the practice of law by the state constitution and the state code and the Alabama Canons of Judicial Ethics. Amendment 328, § 6.08, Alabama Constitution (1901), provides:

Prohibited Activities.

(a) No judge of any court of this state shall, during his continuance in office, engage in the practice of law or receive any remuneration for his judicial service except the salary and allowances authorized by law.

Section 34-3-11, Alabama Code (1975) provides:

Judges Not to Practice Law.

Any judge of a court of record in this state who practices law in any of the courts of this state, or of the United States, or who renders any professional services or gives any legal advice, must on conviction, be fined in such sum as the jury or court trying the same may assess, not less than \$100, no more than \$1,000.

Canon 5F, Alabama Canons of Judicial Ethics provides:

Practice of Law.

A judge should not practice law.

It is undisputed that the county occupational tax is levied with respect to and measured by gross receipts. Section 2, Ordinance 1120 provides:

... which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Appendix to Petition, p. 132.

Section 1, Ordinance 1120 (the definitional section) provides: ✓

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received. But the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

Appendix to Petition, p. 131.

Although the county tax is clearly within the Buck Act definition of the term "income tax", the trial court

and court of appeals relied on the county's label of the tax as a privilege license tax. That ignored the test established by this Court in *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953) where the Court examined a municipal tax indistinguishable from the county tax in this case. The issue in *Howard* was the same as this case; whether the municipal tax violated the doctrine of intergovernmental tax immunity or fell within the consent of the Buck Act or PSTA. This Court held that the answer turned on whether the tax was an income tax under federal law. This Court applied the federal definition of the term "income tax" contained in the Buck Act and held that the Louisville tax was measured by gross receipts, therefore, it was an income tax for purposes of the Buck Act even though denominated a privilege license tax under Kentucky law. This Court held that it makes no difference how the tax is denominated under state law:

[t]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act. . . . We hold the tax authorized by this ordinance was an income tax within the meaning of federal law.

344 U.S. at 628-9.

In the instant case the court of appeals ignored *Howard* by looking to the County's label on the tax as a privilege license tax instead of looking to the Buck definition of the term "income tax". The court of appeals' refusal to follow *Howard* is illustrated by the following sentence from its opinion:

... if the state court's denomination is a reasonable interpretation of the ordinance, we deem it conclusive.

92 F.3d at 1570.

The county tax is clearly within the *federal* definition of the term "income tax" in the Buck Act. It is therefore axiomatic that the county tax falls within the consent of the Buck Act.

3. Intergovernmental Tax Immunity:

QUESTION: IS THE COUNTY TAX LEVIED DIRECTLY ON THE UNITED STATES ITSELF?

ANSWER: NO.

The evidence in this case is undisputed and the trial court and the court of appeals expressly found that the County tax imposes no economic burden on the United States. At 850 F.Supp. 1544 the trial court found: "The Jefferson County tax, of course, would be paid by individual federal judges, the defendants, out of their own pockets *without imposing any monetary (economic) burden upon the Federal Government itself.*" And, the court of appeals stated:

We accept that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge may be no more intimately connected with the federal government when receiving income than the federal employee in

O'Keefe. We hold that the legal incidence of the tax falls on the federal judge.

92 F.3d at 1571-72.

Despite finding that the economic burden and legal incidence of the tax were *not* on the United States, the trial court and court of appeals held the tax violated the tax immunity doctrine. That ignores the test established by this Court in *Davis v. Michigan Dept. of Treasury*, *United States v. New Mexico* and *Graves v. New York* which all hold that the doctrine is violated only where the tax is levied directly on the United States itself. Judges Acker and Clemon are not the United States. They are *employees* of the United States. When receiving income for services rendered they are no different than any other federal employee. As such, their salaries are subject to a number of taxes including federal income tax, FICA tax, state income tax and the city and county tax. Because the county tax is not levied upon the United States government it is axiomatic that there is no violation of the tax immunity doctrine. *Davis v. Michigan Dept. of Treasury*, *United States v. New Mexico*.

CONCLUSION

The court of appeals erred by holding: (1) that federal jurisdiction exists over this case; (2) that Congress did not consent to the levy of the tax on the judges' pay or compensation; and (3) that the tax violates the Supremacy clause and related doctrine of intergovernmental tax immunity.

With regard to jurisdiction, the County urges the Court to apply the same bright line test from *Arkansas v. Farm Credit Services* to federal employees who seek to litigate with state taxing authorities in federal court. The United States should be required to be a co-party if the judicial exception is to be available to a federal employee.

With regard to Congressional consent, when the undisputed evidence is analyzed under the correct tests it is axiomatic that the county tax is an "income tax" under the federal definition of that term in the Buck Act. That satisfies the only requirement in the Buck Act. It is also axiomatic that the county tax does not discriminate against federal employees on account of the source of their pay or compensation. That satisfies the only requirement in the PSTA. It follows that Congress consented to the levy of this tax on these judges thereby waiving whatever immunity might otherwise exist.

With regard to the Supremacy clause and related doctrine of tax immunity, the undisputed evidence proves that the tax is not levied in form or substance on the United States. It follows that there is no violation of the doctrine of tax immunity or the Supremacy clause.

The County urges the Court to reverse the trial court and court of appeals and remand the case to state court for lack of federal jurisdiction. However, if the Court determines that federal jurisdiction exists, the county requests the Court to reverse the trial court and court of appeals and rule in the county's favor on the Supremacy clause issue. The Court is reminded that the trial court held that the tax also violates the Compensation clause but the court of appeals declined to reach that question.

Therefore, the county urges the Court to also rule in the county's favor on the Compensation clause issue or to remand the case to the court of appeals with instructions to consider the Compensation clause issue.

Respectfully submitted,

EDWIN A. STRICKLAND

JEFFREY M. SEWELL*

Jefferson County Attorney's Office -

A-610 Courthouse Annex

716 North 21st Street

Birmingham, AL 35263

(205) 325-5688

* Counsel of Record

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No. 98-10

Supreme Court, U.S.
FILED

FEB 22 1999

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM M. ACKER, JR. and U.W. CLEMON,

Respondents.

On Writ of Certiorari To The United States
Court of Appeals for the Eleventh Circuit

**BRIEF OF RESPONDENTS
UNITED STATES DISTRICT JUDGES
WILLIAM M. ACKER, JR. AND U.W. CLEMON**

ALAN B. MORRISON
(Counsel of Record
for Judge U.W. Clemon)

DAVID C. VLADECK

ERICA CRAVEN

PUBLIC CITIZEN

LITIGATION GROUP

1600 20th Street, NW

Washington, D.C. 20009

(202) 588-7720

IRWIN W. STOLZ, JR.

(Counsel of Record for
Judge William M. Acker)

SEATON D. PURDOM

GAMBRELL & STOLZ, L.L.P.

4300 One Peachtree Center

303 Peachtree Street NE

Atlanta, GA 30308

(404) 577-6000

Attorneys for Respondents

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No. 98-10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEFFERSON COUNTY, ALABAMA,
Petitioner,

v.

WILLIAM M. ACKER, JR. and U.W. CLEMON,
Respondents.

On Writ of Certiorari To The United States
Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS
UNITED STATES DISTRICT JUDGES
WILLIAM M. ACKER, JR. AND U.W. CLEMON

This case raises the question whether Jefferson County, Alabama has the right under the United States Constitution to require that respondents and other federal judges appointed pursuant to Article III of the Constitution be licensed by the County in order to perform their federal judicial functions. Petitioner and the United States as its supporting *amicus* contend that the Jefferson County licensing ordinance merely imposes an ordinary income tax and that respondents must pay the license fee, also referred to as a "privilege tax," just as they pay income taxes to the State of Alabama. The Eleventh Circuit, twice sitting *en banc*, rejected petitioner's argument because it correctly understood that the County was attempting

to license federal judges, not tax their incomes, and that its licensing law violates the Constitution. In addition, the court of appeals properly turned aside petitioner's claim that the district court was barred by the Tax Injunction Act from deciding the merits of this case so that respondents would not be forced to litigate their constitutional claims in the state courts of Alabama.

STATEMENT OF THE CASE

1. Factual and Statutory Background

This case began in December 1992 with the filing of two separate complaints in the Small Claims Division of the District Court for the Tenth Judicial Circuit for the State of Alabama in Jefferson County. In these actions, petitioner Jefferson County sought to recover what it calls "license fees" that it claims are owed by respondents, plus interest and penalties, for the privilege of engaging in their occupation as United States District Judges for the Northern District of Alabama, insofar as they do so in Jefferson County. As judicial officers of the United States, respondents' defense was that the licensing system violated the United States Constitution because it interfered with carrying out their official judicial functions and because it diminished their compensation in violation of Article III. Accordingly, they removed the cases to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1442(a)(3), where the cases were consolidated before Senior District Judge Charles A. Moye of the Northern District of Georgia, sitting by designation.

The statutory basis for petitioner's claims is Jefferson County Ordinance 1120 of 1987, enacted after respondents had been appointed to their judicial offices. Pet. App. 129-39. Under Alabama law, cities and counties have no authority to

impose an income tax (*id.* at 84 n.2), but they are permitted by Alabama Act No. 406, approved September 7, 1967, to enact "a business or privilege tax" for those persons who are not otherwise required by Alabama law to pay such a tax to the State. Pet. App. 126. Under Ordinance 1120, which specifically applies to all federal and state officials, the amount of the tax is one half of one percent of the gross receipts or compensation paid *or owed* to the licensee for services performed in Jefferson County. No tax is required to be paid on other income, such as dividends, interest, or profits from sales of stock or other property. But the tax must be paid, whether or not the money is received, since, under section 1(F), compensation includes money that "a person receives or is entitled to receive from . . . his employer. . . ." Pet. App. 131.

Under 28 U.S.C. § 132, there are seven authorized active judges in the Northern District of Alabama, which is headquartered in Birmingham in Jefferson County. However, these judges also sit from time to time in the six other Divisions in the Northern District, which, in the case of respondent Clemon, results in approximately one-third of his time being spent outside Jefferson County. Pet. App. 116. Salaries for District Judges were \$133,600 per year when this case was filed, 28 U.S.C. §§ 135, 461 (1994 & Supp. 1998), and thus the amount at issue can be no more than \$668 per judge and is almost certainly less since most, if not all, of the judges have judicial activities outside Jefferson County that constitute a significant portion of their caseloads. Furthermore, for reasons that are not apparent from the face of Ordinance 1120, senior judges, such as respondent William Acker, are not required to pay a license fee once they take senior status, but they continue to be liable for fees for the time when they were active judges.

Under the Alabama statute that permitted petitioner to enact Ordinance 1120, a county may not impose such a tax if "a license or privilege tax" is otherwise required by the State. Pet. App. 127, § 4. Included in the exemption actually enacted by petitioner (Pet. App. 130, § 10 (B)) are approximately 140 categories of individuals and businesses listed in Chapter 12, Article 2 of Title 40 of the Alabama Code. Pet. App. 143-46. Petitioner has chosen to reprint the text of only 23 of the exemptions (*id.* at 161-75), but they are reasonably representative of the whole. For purposes of this litigation, the contrast in annual payments required by the State among those 23, and those required of respondents by petitioner, is most stark for accountants and architects (\$25)[48 & 43], engineers (\$20)[99], embalmers (\$10)[98], manicurists (\$5)[124], and doctors (\$25, \$10, or \$5 depending on the size of the city where they work)[126].¹ Since respondents were licensed attorneys in Alabama before they became federal judges, the most telling exemption for them is that enjoyed by members of the Alabama Bar. Instead of paying a "license fee" of one half of one percent of their gross receipts to Jefferson County, lawyers working in Jefferson County pay license fees of only \$250 per year to the State of Alabama, no matter how much they earn.²

¹ Numbers in brackets in text and in note 2 correspond to paragraphs in Chapter 12.

² The pattern of license pricing is difficult to discern, but is clearly not based on actual, or in most cases, potential income. Beauty parlors are charged \$10 per year, plus \$6 or \$4 per operator depending on the size of the community [61], whereas barbers are charged \$2.50 per chair [58]. Fruit dealers pay license fees of \$10 or \$5 per stand [105], while those who buy
(continued...)

Several other features of the Ordinance are of significance. First, and most important, section 2 provides that it "shall be *unlawful* for any person to engage in or follow any vocation, occupation, calling or profession . . . without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession" (emphasis added). This language is not merely hortatory since under section 10(B), if a person "shall fail, neglect or refuse to pay a license fee as by this Ordinance required," such person "shall upon conviction be subject to punishment within the limits of and as provided by law for each offense," although, to date, no federal judge has ever been charged with a violation of section 10(B).

Second, if a licensee works both inside and outside the County, section 3 requires an apportionment to be made by the

²(...continued)

or sell horses, mules, jacks or jennets pay a fee of \$20 for each county in which they operate [112]. Fortune tellers and others engaged in similar activities have to pay \$40 [104], almost twice the highest rate that doctors and dentists [92] have to pay, but magicians get their licenses for \$5 per year [119], the same fee charged veterinarians, but only after they have been in practice for two years [178]. Another apparently disfavored group (pawnbrokers) must pay \$250 for their annual license [138]. And, unlike most licensees who pay a fixed annual fee, automobile storage garages pay at the rate of \$2 per 1000 square feet up to 50,000 square feet, and then \$1 per 1000 thereafter [55], while outdoor lots pay at half that rate [56]. Finally, although there is no specific exemption for ministers and other clergy, neither the State nor Jefferson County has attempted to license them.

licensee's employer or the licensee. Thus, because judges in the Northern District of Alabama frequently sit outside Jefferson County, they must either keep detailed time records reflecting where their compensation is "earned" in order to calculate their fee properly, or pay a higher fee than the law requires by assuming that all of their compensation is earned in Jefferson County.

Third, section 4 requires the employer to withhold the amounts due and pay them to the County, and section 7 gives the Director of Revenue the authority to audit the books and records of the employer and employee to determine whether the proper fee is being paid. No entity of the federal government, including the Administrative Office of the United States Courts, has ever withheld the amounts claimed by petitioner to be due from respondents or any other federal judge, nor have they filed any of the returns required by Ordinance 1120.

Respondents recognize that they are obligated to pay, and do in fact pay, income taxes to the State of Alabama, because those taxes are not imposed on a discriminatory basis. Their basic objection to the tax here is that it is not an income tax under either Alabama or federal law, but is instead, as the Ordinance itself proclaims, a license fee based on income, assessed by petitioner on respondents for the privilege of being a federal judge. Because a license is an imposition made on a federal function, the doctrine of inter-governmental immunity precludes petitioner from imposing such a requirement on respondents whose "license" to serve as federal judges comes from the United States, not Jefferson County. Moreover, the law discriminates against respondents by allowing others who hold licenses under Alabama law to avoid Ordinance 1120 entirely. Finally, respondents contend that the license charge is also an unconstitutional diminishment of their salaries, in

violation of Article III of the Constitution, particularly because it was imposed for the first time after they became federal judges.

2. Prior Proceedings

After the district court denied petitioner's motion to remand based on the claim that the federal courts were barred from hearing this action by the Tax Injunction Act, 28 U.S.C. § 1341, the case proceeded on cross-motions for summary judgment, including a stipulation of facts. The district court carefully analyzed the Ordinance and agreed with respondents that it was an unconstitutional license on the performance of a federal function and that it unconstitutionally diminished their salaries. Pet. App. 82-112.³

Petitioner appealed to the Eleventh Circuit, raising only issues on the merits. A divided panel reversed in an opinion written by Judge Birch. In the majority's view, the license fee was an income tax imposed on respondents, and as such it was entirely lawful. Chief Judge Tjoflat dissented, agreeing with the district court that the Ordinance was unconstitutional on both grounds urged.

Respondents were then granted rehearing *en banc*, and the full court, by a vote of 9-3, reversed the panel and sustained respondents' claim that the Ordinance imposed an

³ Following the ruling of the district court, the other federal judges who sit with respondents in Jefferson County ceased paying the license fee and have not paid it since then. See Brief *Amici Curiae* of Seven United States District Judges of the Northern District of Alabama Supporting Respondents.

unconstitutional direct tax on the exercise of the federal function of serving as an Article III judge. In the course of a thorough review of both constitutional doctrine and the statutes cited by petitioner to support its claim that the United States had consented to the imposition of this tax, the majority opinion, written by Judge Cox, focused on the substance of what the Ordinance did, and not on the labels attached to it. As the majority concluded, petitioner was "taxing a federal judge in the performance of his or her judicial duties [which] is fundamentally different from taxing his or her income." Pet. App. 49. They based their conclusion on both Alabama law and their own view of the operation of the statute, principally the portion which, in addition to imposing a tax, also made it "unlawful for a federal judge to perform his or her duties in Jefferson County without paying the privilege tax." *Id.* at 51. In reaching their conclusion, the majority stated that they had "no doubt that, under the Supremacy Clause, Jefferson County could not enjoin or otherwise prevent a federal judge from performing federal duties [and] that the Supremacy Clause protects the federal judiciary not only from outright obstruction but also from a requirement that a federal judge pay a fee to lawfully perform his or her duties." *Id.* at 51-52.

The court also considered and rejected petitioner's contentions that the Public Salary Tax Act, 4 U.S.C. § 111, and the Buck Act, 4 U.S.C. § 106(a), amounted to consents to impose the taxes here. As for the former, the majority reasoned that, while "Congress intended to consent to state taxation of federal employees' income to reciprocate for the imposition of the federal income tax on state employees, [Congress did] not consent to all state taxes on federal employees," in particular those "state taxes that in substance are not taxes on income." *Id.* at 56. With respect to the Buck Act, the court correctly noted that it "merely precludes a taxpayer from arguing that a

state or locality lacks jurisdiction to tax her because she resides in a federal area or receives income from transactions or services in a federal area," contentions that respondents have never made. *Id.* at 58, 60. In light of its conclusion that Congress did not consent to these taxes, the court found it unnecessary to reach the issue of whether the district court properly concluded that Article III would also invalidate Ordinance 1120, as applied to respondents. *Id.* at 35. Hence, that issue is not before the Court. Finally, because nine members of the *en banc* Eleventh Circuit had sat in Jefferson County within the last five years, and hence would, under petitioner's interpretation of Ordinance 1120, have to pay license fees for their time spent there, the court also addressed recusal and unanimously concluded that all of the judges could properly hear this appeal. *Id.* at 74-81.

Judges Birch and Henderson, who had comprised the panel majority, dissented, joined by Judge Anderson. *Id.* at 63-74. Their principal disagreement was over the proper characterization of the operation and effect of the Ordinance, which they believed are indistinguishable from those of an income tax, which everyone agreed could be lawfully imposed.

Jefferson County then filed a petition with this Court (No. 96-896) seeking review only on the merits. At the invitation of the Court, the Solicitor General filed a brief urging the Court to grant review because the decision below was allegedly incorrect and in conflict with the Third Circuit's decision in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985), a case that the Eleventh Circuit majority had distinguished because of significant differences between the two ordinances. Pet. App. 56 n.19. The Solicitor General also suggested that the basis for removal under section 1442(a)(3) was unclear – an issue raised neither by petitioner nor by any of the thirteen judges who had considered the case – and suggested

that the Court might wish to have that issue briefed if review were granted.

On June 9, 1997, this Court granted review and summarily vacated and remanded the case for further consideration in light of *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776 (1997), which had been handed down the previous week. At issue in *Farm Credit Services* was the applicability of the Tax Injunction Act in an action in which a government-created corporation had sued in federal court to invalidate a state tax, but to which the United States was not a party. This Court found the Tax Injunction Act was a bar in those circumstances, and its remand order in this case suggested that it might also be a bar here, although petitioner had not raised that Act in either the court of appeals or in its submissions in this Court.

The entire Eleventh Circuit reconvened, and in another carefully considered and detailed opinion for the majority, Judge Cox held that the Tax Injunction Act was inapplicable. Although rejecting the argument that the removal provision that conferred federal jurisdiction was alone sufficient to overcome the Act, the majority read the provision as evidence of congressional intent that officers of the United States, raising federal defenses tied to their positions as federal officers, should be able to litigate those federal defenses in federal court, even where the collection of state taxes was at stake, just as the United States could do in a similar situation. Pet. App. 21. As the court put it, "refusing to apply the exception in this case [because the Attorney General had not sided with the judges] would be equivalent to a finding that Congress intended to put the judicial branch at the mercy of the executive." *Id.* at 22.

The same three dissenters from the prior *en banc* decision dissented on remand, this time joined by Judge Carnes who, after reading the brief of the United States filed in this Court, changed his mind on the merits. *Id.* at 24. All of the dissenters except Judge Anderson would also have reversed under the Tax Injunction Act, but none of them agreed with the Solicitor General that there was any problem with the original removal under section 1442(a)(3). Petitioner then sought review in this Court, which was granted on December 7, 1998.⁴

SUMMARY OF ARGUMENT

1. The Tax Injunction Act did not oust the district court of jurisdiction in this case. The words of that Act, its admitted legislative purpose, and the cases construing it all

⁴ One other development is relevant. There is a certified class action in the Alabama state courts, in which classes of both federal and non-federal workers challenge Ordinance 1120 on grounds other than those raised here. *Richards v. Jefferson County*, Circuit Court of Jefferson County, Case No. CV-92-3191, Order Certifying Class dated May 14, 1997, on remand from *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996) (reversing dismissal based on improper reliance on res judicata). On November 12, 1998, the trial judge entered an order finding Ordinance 1120 in violation of the Equal Protection Clause (Add. 1a-3a). Petitioner has been directed to report to the court on how it will remedy the situation. Respondents are advised that the Alabama legislature is considering an amendment to the Alabama statute that would alter the scheme that authorized petitioner to impose the fees at issue in this case and that may, depending on its final form, eliminate this controversy for the future, as *Richards* may have done for the past.

support the conclusion, joined by the Solicitor General, that the Act bars only "anticipatory relief" in the federal courts. *California v. Grace Brethren Church*, 457 U.S. 393, 409 (1982). Since this is a collection action brought by the taxing authority against respondents, and it reached federal court through the special removal provisions of 28 U.S.C. § 1442(a)(3), the Act does not apply, and the lower courts properly reached the merits.

Even if the Act applies, there is a judicially-recognized implied exception for actions brought by the United States or its agencies or instrumentalities. Where the Attorney General seeks relief from a state or local tax, or joins in the relief sought by an agency or instrumentality, the exception automatically applies. Where, as here, the United States does not join the persons or entities challenging the tax, the exception nonetheless applies where the challengers hold regulatory positions and, as the court of appeals correctly held here (Pet. App. 20), where they are members of another branch of government. Thus, it would be an affront to principles of separation of powers to allow the Attorney General to control the access of federal judges to federal courts where the challenge is to a state or local tax that would, if upheld, interfere with the ability of respondents to carry on their official duties.

The right of federal court access, notwithstanding the Tax Injunction Act, is fortified here because Congress has, through section 1442(a)(3), provided for a federal forum for federal judges who are sued in state court and who are defending the case on grounds of federal immunity. To allow the Tax Injunction Act to trump the removal provision would relegate federal judges to defend their offices, and to litigate their claims of federal immunity, in state courts, contrary to the expressed intent of Congress. Thus, at least where federal

judges are defendants in state court collection actions, and where their defense is based on a claim of federal immunity, the Tax Injunction Act does not create a barrier to having the district courts decide cases that are removed under section 1442(a)(3).

2. The court of appeals properly held that petitioner may not require Article III judges to pay a license fee for the privilege of carrying out their constitutional duties, even though the amount of the fee is tied to the earnings of the judge in Jefferson County. No one as yet has contended that an order from an Alabama court could constitutionally enjoin respondents from deciding cases assigned to them in the Northern District of Alabama because respondents did not first obtain a license from the County. Petitioner attempts to defend Ordinance 1120 on the ground that it is no more than a garden variety income tax, of the kind that this Court has held may be imposed on federal officers and employees by state and local governments, and to which Congress has consented in the Public Salary Tax Act, 4 U.S.C. § 111. All parties agree that the constitutionality of Ordinance 1120 does not depend on the label attached to the fees charged, but on whether those fees are properly categorized as income taxes, or whether they are, in effect, an attempt by the County to license federal judges.

Two aspects of Ordinance 1120 demonstrate that it is not an income tax of the kind approved by Congress and this Court. First, the Ordinance makes it "unlawful" for respondents and others to engage in their occupations without having paid the tax. Income tax laws do not forbid taxpayers from earning a living in order to pay their taxes; on the other hand, licensing laws routinely make it "unlawful" to engage in an activity without a license, as does Ordinance 1120. Indeed, because the fee must be paid when a person becomes "entitled" to

compensation, regardless of receipt, this further confirms that the fee is paid for a license, not as a form of income tax. Thus, unless respondents are willing to pay petitioner's fees, the only way that they can avoid the licensing requirement, and hence not violate the law, is to stop doing the jobs to which they have been constitutionally appointed – the hallmark of a licensing scheme.

Second, Ordinance 1120 completely excludes from its reach any person who obtains a license from the State of Alabama. This wholesale exemption applies regardless of how small a fee (if any) is paid for the other license, or what the relation of that fee is to the fee that would be charged by the County but for the exemption. If this fee were a true tax on income, the other fee would either be disregarded or a credit or deduction for it might be allowed in determining the amount owed to Jefferson County. But the total exemption here is inconsistent with any income tax scheme of which we are aware, although it is perfectly consistent with a system in which a person is required to have one and only one occupational license in a State.

The exemption for other licenses provides another reason why, even if the license fee could be considered an income tax, it would nonetheless be invalid. As this Court made clear in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), a tax that discriminates against federal workers is forbidden by both the Public Salary Tax Act and the inter-governmental tax immunity doctrine. Under *Davis*, discrimination includes not only singling out federal workers for less favorable treatment, but including federal workers – there, federal retirees – in the group that is treated less favorably, even if those receiving more favorable treatment – there, no taxation for retirees from state government – are only a small fraction of the entire group. That rationale fits this case like a glove since

federal judges are not, like most people in Jefferson County, licensed by the State, and thus must pay an occupational tax, but anyone who holds an Alabama state license of any kind is exempt. The fact that Alabama could not constitutionally license federal judges (and thereby exempt them from Ordinance 1120) does nothing to eliminate this unlawful discrimination. Accordingly, because the discrimination here is indistinguishable from that condemned in *Davis*, Ordinance 1120 can not be applied to respondents.

ARGUMENT

THE JUDGMENT SHOULD BE AFFIRMED.

I. THE DISTRICT COURT HAD JURISDICTION OVER THIS CASE.

This case began when petitioner filed suit in small claims court in Alabama, under state law, to collect the fees that it contends respondents owe. Because respondents are federal judges, and because they contend that petitioner is seeking to require them to have a license from Jefferson County in order to perform their official duties as district judges, respondents removed their cases to federal court under 28 U.S.C. § 1442(a)(3). That statute permits removal by "Any officer of the courts of the United States, for any Act [sic] under color of office or in the performance of his duties." Although the Solicitor General believes that removal was not proper under section 1442(a)(3) – an argument to which we respond *infra* at pp. 24-26 – petitioner never questioned the applicability of section 1442(a)(3), but instead based its argument opposing federal court jurisdiction on the Tax Injunction Act, 28 U.S.C. § 1341. The district court rejected that argument, as did the court of appeals on remand from this Court. As we now show,

there are two basic reasons why section 1341 did not preclude the district court from deciding this case.⁵

⁵ Petitioner did not raise section 1341 on its appeal to the Eleventh Circuit, nor in its first petition to this Court. Thus, unless the statute is "jurisdictional," the defense was waived. This Court has, without much discussion, treated section 1341 as non-waivable even where it was not argued below. *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776, 1779-80 (1997). Other courts have gone so far as to conclude that even a statute that waived a state's immunity from suit under the Eleventh Amendment would not suffice to avoid section 1341. *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979); *City of Burbank v. State of Nevada*, 658 F.2d 708 (9th Cir. 1981); and *Kelly v. Springett*, 527 F.2d 1090 (9th Cir. 1975).

In our view, section 1341 presents no such impregnable barrier to federal court consideration of state and local tax cases. As is undisputed, the law was enacted to protect states from federal court litigation that would interrupt the collection of taxes. *Farm Credit Services*, *supra*, 117 S. Ct. at 1782. Given this rationale, there is no reason to believe that Congress would, in effect, want to protect states from themselves by making section 1341 non-waivable. Moreover, federal courts are plainly competent to decide these cases, given both the implied exceptions to section 1341, as well as the right of losing taxpayers to take federal questions arising in state tax cases to this Court. Furthermore, while the term "jurisdiction" was in the original version of what is now section 1341, *see Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943) (quoting original version), it was not included in the 1948 recodification of Title 28, with no explanation, and thus is no
(continued...)

A. *The Anti-Injunction Act Does Not Apply To Collection Actions Such As This.*

We begin with the language of section 1341: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The district court did not take, nor was it ever asked to take, any of the actions expressly prohibited by section 1341. Nor was it asked to issue a declaratory judgment, which this Court has found to be precluded by section 1341. *California v. Grace Brethren Church*, 457 U.S. 393 (1982). And this case does not involve an attempt, prohibited by *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981), to use 42 U.S.C. § 1983 to recover damages as a means of avoiding section 1341. In those actions, the taxpayer is the plaintiff seeking federal-court "anticipatory relief." *Grace Brethren Church*, *supra*, 457 U.S. at 409. Here, by contrast, the persons who allegedly owe the taxes were state court defendants, and their federal case would produce the same kind of ruling that would have come from the state case: either they would be liable for the money or they would not. But in neither forum would an injunction or its functional equivalent be issued. In short, what was changed here by removal of this collection action was that the decisionmaker became a federal instead of a

⁵(...continued)

longer in what is now section 1341. Therefore, although respondents believe that petitioner's failure to raise the Tax Injunction Act in the court of appeals should constitute a waiver, we believe that the Court can and should find the Act inapplicable on other grounds.

state court, but the relief sought was unaffected.⁶

⁶ In this situation, the change was quite pronounced since, absent removal, this constitutional issue would have been tried in the first instance in the small claims section of the Alabama district court, which has exclusive jurisdiction over all cases where the amount in controversy does not exceed \$3000. Ala. Code 12-12-31. District judges who hear those cases are elected for terms of six years, Ala. Code 12-17-65, under a system that was revised in 1988, but that still has no limits on the amount that any person (lawyer or client) can contribute to a judge's campaign. *See generally* Ala. Code 17-22A-1 to 17-22A-23. The complaint in small claims cases must be answered in 14 days, Small Claims Rule F, and only limited discovery is allowed. Ala. Rule of Civ. Proc. 26(dc). Alabama Small Claims Rule M allows judgments in small claims cases to be appealed to the circuit court within 14 days of the judgment, where there is a right to a de novo proceeding, including discovery and a new trial. Ala. Code 12-11-30(3). The losing party then has an additional right of appeal to the Court of Civil Appeals, Ala. Code 12-22-2 & 12-3-10. Review in the Alabama Supreme Court is by discretionary writ of certiorari, but only after the Court of Appeals has overruled an application for rehearing, and only if the petition to the Alabama Supreme Court, with an accompanying brief, is filed within 14 days after the denial of rehearing. Ala. Rule of App. Proc. 39(a) & (b). Thus, respondents would have had to proceed through four levels of state courts in Alabama before being able to seek review in this Court. The federal removal statutes were originally enacted "to protect federal officers from interference by hostile state courts," and one of their "primary purposes" was "to have [federal] defenses litigated in the federal courts. *Willingham v.* (continued...)

The legislative history of section 1341, on which this Court has often relied (*see e.g., Grace Brethren, supra*, 457 U.S. at 409 n.22; *Great Lakes Dredge & Dock, supra*, 319 U.S. at 301), strongly supports the conclusion that this provision is intended to preclude only anticipatory actions and not defensive ones. The principal concern behind the bill was to prevent the federal courts from interfering with the ability of states to collect taxes, even on a temporary basis. The sponsors were very concerned about the ability of foreign corporations, using diversity jurisdiction, to go to federal court and either stop efforts to collect the taxes or force the states into settling for very low sums because they lacked the money to operate their governments until the cases could be decided. H. Rep. No. 1503, 75th Cong., 1st Sess. (1937) (making Senate report its own). *See also Perez v. Ledesma*, 401 U.S. 82, 127 n. 17 (1971) (Brennan, J., concurring). Indeed, in a legal brief that was attached to the House Report, the author indicated that the bill would *not* bar refund actions in federal court, even though the same issues would be decided that could not be decided in an action that came within the Tax Injunction Act. Unlike anticipatory suits for injunctions, where there is a substantial possibility of impairment of the revenue collection function, allowing this action to proceed in district court does not create any such problem.

⁶(...continued)

Morgan, 395 U.S. 405, 407 (1969). But surely along with those benefits come the right to have the case tried by an Article III judge and the right to litigate in the federal court system instead of whatever system a State may choose for its own cases.

This case does not raise any of those concerns (or even those that might be raised by a taxpayer's federal court suit for a refund) since Jefferson County apparently has used the best collection means available to it: a lawsuit in small claims court to collect the money that respondents allegedly owe. Apparently, Jefferson County is not sufficiently concerned about revenue loss to enact other mechanisms to assure that taxpayers pay first and only contest the tax afterwards. Thus, in this case, not only are the words of section 1341 inapplicable to the judgment entered by the district court here, but allowing this suit to remain in federal court does not offend any purpose underlying the Tax Injunction Act. It was in recognition of these principles that several lower courts have found no bar to district courts hearing actions, like this, seeking to collect state taxes. *Louisiana Land & Explor. Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 818 (5th Cir.), *cert. denied sub. nom. Alabama Dept. of Rev. v. Pilot Petroleum Corp.*, 498 U.S. 897 (1990); *Arizona v. Atchison Top. & St. Fe. Rail. Co.*, 656 F.2d 398, 402 (9th Cir. 1981); *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969), *vacated and remanded on other grounds sub. nom. Askew v. Hargrave*, 401 U.S. 476 (1971). *Contra Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547 (2d Cir. 1991). It is on this basis that the Solicitor General agrees with respondents and the Eleventh Circuit that the Tax Injunction Act does not require a remand to state court here. U.S. Br. at 15-17.

B. *The Implied Exemption For The United States And Its Instrumentalities, Together With Section 1442(a)(3), Entitled Respondents To Remove And Retain This Action In Federal District Court.*

Although the language of section 1341 is absolute, the

courts have recognized several exceptions, the most relevant being for the United States and its instrumentalities. If an exception applies, it allows suits to be filed in federal district court that actually seek an injunction against the collection of state taxes – precisely what section 1341 literally proscribes. The basis for this implied "judicial exception" (*Farm Credit Services, supra* 117 S. Ct. at 1778), which does not appear in section 1341 or any other specific cross-referenced provision, is the need for "the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) (exception invoked to protect tax-exempt status of Red Cross). In this case, respondents' claim on the merits is that petitioner's Ordinance is a direct interference with the federal judicial function, just as if petitioner sought to close down the federal courts if respondents and the other federal judges did not pay the County's license fees. Indeed, since this suit is not really about money, and respondents would be objecting to this scheme if the license fee were only \$1 per year, this case is arguably not within the Tax Injunction Act at all. Analyzed under these rationales, respondents' defenses here would, in our view, have entitled them to bring their own affirmative action to test the constitutionality of Ordinance 1120, notwithstanding the Tax Injunction Act.

But respondents do not ask the Court to reject the applicability of section 1341 on that basis since there is a narrower ground on which the Act can be avoided. This case entered the federal courts via the special statute, 28 U.S.C. § 1442, that allows federal officers who are sued over their official duties to remove those suits to federal court so that federal and not state judges will pass on their defense that federal law permits them to do what state law allegedly forbids. *Mesa v. California*, 489 U.S. 121 (1989); *Gay v. Ruff*, 292 U.S. 25, 33

(1934) (removal needed in cases where state charges federal official with conduct that federal law requires). In its second *en banc* decision, the Eleventh Circuit declined to hold that section 1442(a)(3) alone overrode the Tax Injunction Act, but it did find that it embodied a congressional policy that federal judges should have the right to have their claims of federal immunity decided by federal courts. Pet. App. 21-22. Therefore, it concluded, the implied exception for the United States and its instrumentalities applied to this case.

Relying on this Court's decision in *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776 (1997), petitioner had argued that, since the United States, acting through the Attorney General, had not joined in the defense, and in fact disagreed with respondents on the merits, the exception did not apply. The court of appeals quite properly rejected that argument, recognizing the grave separation of powers problems that would ensue by putting federal judges "at the mercy of the executive" by allowing the Attorney General to control the access of members of the Judicial Branch to federal court. Pet. App. 22. In reaching that result, it further relied on the congressional policy embodied in section 1442(a)(3) – to provide for federal court access for all officers of the federal courts, whenever they are sued over their official conduct, as they were here, with no requirement that the Attorney General join in the removal petition. Compare 28 U.S.C. § 2679(d)(2) (allowing suits against federal employees in state court to be removed to federal court "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . ."). Accordingly, the implied exception for suits involving the United States and its instrumentalities extends at least as far as to cover cases removed by Article III judges pursuant to section 1442(a)(3).

There are two possible responses to this argument, neither of which is on target. First, *Farm Credit Services* could be construed to make the exception for instrumentalities of the United States depend entirely on whether the Attorney General supported the federal officer seeking access to federal court, even in situations such as this where drawing that line would raise significant separation of powers concerns. But such a broad reading of *Farm Credit Services* can not be justified. The entity at issue in *Farm Credit Services* was not one of the three branches of government, it did not have any regulatory responsibilities, and it was not staffed by officers of the United States, appointed under the Appointments Clause. Rather, it was under the general control of one sub-unit within the executive branch, the Farm Credit Administration. Indeed, the entity bringing suit there was a private corporation that performed private functions, but was imbued with certain governmental characteristics. Under those circumstances it makes eminent sense to assume that Congress wanted to allow such entities to overcome the Tax Injunction Act only with the support of the Attorney General. However, *Farm Credit Services* says nothing about the very different situation here where respondents are the direct instrumentalities of one of the three branches of the federal government in the Northern District of Alabama. As the opinion in *Farm Credit Services* recognized, the Court must also consider the "other side of the federal balance" in deciding how far the exemption applies, 117 S. Ct. at 1780, and here, unlike in *Farm Credit Services*, that other side tips the scales decidedly in favor of an implied exception to the Tax Injunction Act.⁷

⁷ If *Farm Credit Services* is that sweeping an opinion, it would also call into question decisions such as *Federal Reserve* (continued...)

The second objection to reliance on section 1442(a)(3) is raised by the United States only. Although it agrees with respondents that this case is not covered by the Tax Injunction Act at all, it takes the position that, if that Act applies, respondents cannot rely on section 1442(a)(3) to overcome it since they improperly relied on that provision. According to the Solicitor General, the tax at issue here is a garden-variety income tax to which the United States, by the passage of specific legislation, has consented to its imposition on all officers

⁷(...continued)

Bank of Boston v. Commissioner of Corporations & Taxation, 499 F.2d 60 (1st Cir. 1974), in which the exception for the United States and its instrumentalities was applied to cover the Federal Reserve Bank of Boston in its dispute over whether Massachusetts could tax the materials used to construct a new building. Part of the rationale there, and in *Carrolton-Farmers Branch v. Johnson & Cravens*, 889 F.2d 571 (5th Cir. 1989), *vacating and modifying*, 858 F.2d 1010 (1988), which involved the Federal Savings and Loan Insurance Corporation, was the existence of other statutes allowing those entities to sue and be sued in the federal court, provisions that are comparable to the right to remove under section 1442(a)(3) at issue here. The rationale in those cases is also similar to that relied on in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), where this Court rejected the argument that Indian tribes were instrumentalities of the United States, and hence exempt from section 1341, but allowed them to remain in district court based on a specific jurisdictional statute, 28 U.S.C. § 1362, allowing tribes to sue in federal court. Indeed, the Court in *Farm Credit Services* noted both the *Federal Reserve* and *Moe* decisions (117 S. Ct. at 1782 & 1781), and gave no hint that it disapproved of them.

and employees, including federal judges. Therefore, since the tax is being imposed on respondents in their personal, not official, capacities, the case was not properly removed under section 1442(a)(3).

The Solicitor General's brief filed in this Court when certiorari was first sought set forth his position respecting section 1442(a)(3). That brief was submitted by petitioner to the Eleventh Circuit on remand, but not one of the twelve judges who considered the argument found it meritorious. And for good reason: it conflates the merits with removal. Thus, the Solicitor General begins by concluding that respondents are mistaken that they have a federal defense to the payments required by Ordinance 1120, and then uses that conclusion to deny them the right to have the federal court decide whether that conclusion is correct.

But as the cases make clear, *e.g.*, *Jamison v. Willey*, 14 F.3d 222, 238-39 (4th Cir. 1994), the purpose of 28 U.S.C. § 1442 – not just the portion dealing with judges, but the other parts that cover legislators and members of the Executive Branch – is to assure that federal claims and defenses can be decided by federal, not state, courts. This Court's decision in *Mesa v. California*, 489 U.S. 121 (1989), holds that a person's status as a federal officer is not enough to permit removal under section 1442. Rather, the official must also claim a federal immunity of some kind to be able to gain access to a federal court. But the fact that a defendant must raise a federal defense to make section 1442 applicable does not mean that, as part of the decision on whether removal is proper, the district court must *decide* whether the defendant prevails on the immunity claim. *See also Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 474 n.13 (1976) (contrasting standing or capacity to sue with prevailing on the claim).

The need to have the issue of federal immunity decided by a federal judge is the reason for allowing removal in the first place. And yet, according to the Solicitor General (Br. 19-20), the district court must rule on the immunity issue when removal is sought, prior to any discovery or even any pleadings or legal briefing directed to that question. Nothing in section 1442 or the cases interpreting it permits, let alone requires, such an illogical result. As this Court observed in *Willingham, supra*, 395 U.S. at 407: "The officer need not win his case before he can have it removed." Respondents or others who invoke section 1442 may not prevail on the merits, but that no more defeats federal court jurisdiction here than did a similar failure to separate the merits from jurisdiction in the famous case of *Bell v. Hood*, 327 U.S. 627 (1946). And, in any event, as we now demonstrate, respondents are correct in their claims on the merits.⁸

⁸ Federal courts have recently considered a similar issue when removal is obtained under section 1442 in tort suits against federal employees who claim they were acting within the scope of their authority when they committed the alleged tort. If it is determined either by the court or the Attorney General that the conduct was not in the course of the employee's duties, the court must decide whether the case is to be remanded because the United States is no longer a party. In *Garcia v. United States*, 88 F.3d 318, 326 (5th Cir. 1996), the court of appeals directed that the case be retained in the federal court, relying for its conclusion on the brief of the United States, which took the position that if "a federal defense supports removal jurisdiction, the rejection of the defense does not divest a federal court's jurisdiction over the removed action."

II. ORDINANCE 1120 IS UNCONSTITUTIONAL.

In assessing the constitutionality of Ordinance 1120, it may be useful to begin with points on which we believe there is agreement. First, if the Ordinance imposed a true tax on respondents' income, whether based on all income or just on earned income, respondents would have no basis for objecting to it. That would be true no matter whether the tax is called a license fee or an occupational privilege tax, and even if it is clear (as it is in Alabama) that the taxing authority has no power to impose what is called an "income tax" under State law. That is because this Court has held that federal officials have no constitutional right to object to such a tax, *Graves v. New York ex rel O'Keefe*, 306 U.S. 466 (1939), and because Congress has specifically consented to such taxes in the Public Salary Tax Act of 1939, 4 U.S.C. § 111. For these reasons, respondents have always paid Alabama's income tax, even after becoming federal judges.

On the other hand, if petitioner actually sought to require respondents to obtain a license as a condition of performing their duties as Article III judges, there is no question that such interference would be forbidden by the Constitution. *Johnson v. Maryland*, 254 U.S. 51 (1920) (State cannot require postal driver to have State driver's license to drive federal vehicle). Respondents and all other Article III judges receive their "license" to serve when they are nominated by the President and confirmed by the Senate in accordance with the Appointments Clause of the Constitution, Article II, section 2, clause 2. The clearest case of an unconstitutional interference would be one in which petitioner sought to enjoin respondents from deciding cases pending before them until they had obtained a license from the County, much as the Alabama bar can seek to enjoin a person who does not have a license from the Alabama

Supreme Court from practicing law in the State. The interference would be even greater if petitioner brought criminal charges against a federal judge for not obtaining permission to decide cases, but surely no court would insist upon that happening before deciding that petitioner had overstepped its constitutional authority. Moreover, the result would be the same regardless of the size of any license fee that petitioner might charge, or even if there were no fee at all, because the County may not set any conditions on the right to engage in federal functions.

We assume that petitioner and the United States would also agree that, if the license fee at issue in this case were a fixed amount per year, unrelated to respondents' compensation, such an arrangement would be forbidden because it is surely not an "income tax" as that term was used in *Graves* or is used in the Public Salary Tax Act. And it would not matter whether the fee were set at the same \$668 per year maximum for a federal judge who works only in Jefferson County during the year, or were \$250 (the annual license fee for members of the Alabama bar), \$10 (the current annual license fee for embalmers, Pet. App. 170), or even \$1. Moreover, that law would be unconstitutional even if it were perfectly clear that Jefferson County lacked authority to seek an injunction against persons who did not have a license, and there were no criminal sanctions of any kind for non-payment.

A. *Ordinance 1120 Is A Licensing Not An Income Tax Law.*

This case differs from the foregoing hypotheticals only because the fee here is not fixed, but is based on what respondents receive or are entitled to receive as federal judges from work performed in Jefferson County. It is respondents'

position that there is no constitutional difference between those cases and this one, principally because of two features in Ordinance 1120.

First, section 2 makes it "unlawful for any person to engage in or follow any vocation . . . without paying license fees to the County for the privilege of engaging in or following such vocation . . ." Under this provision, according to petitioner, respondents violate the law of Jefferson County every day that they perform their duties as Article III judges without having paid the requisite license fees. Much as the Solicitor General would like to rewrite Ordinance 1120, it does not simply make it "unlawful" not to pay the fees imposed by it. Br. 25-26. Rather, Ordinance 1120 makes it "unlawful" for anyone to work without paying the fees, with the result that, as the majority observed below (Pet. App. 46), "the tax purports to be a precondition to the lawful performance of [respondents'] federal judicial duties." Moreover, respondents have taken an oath to uphold all the laws of the United States, and almost daily they are required to interpret and enforce the laws of Alabama, under which Ordinance 1120 is authorized. Therefore, whatever others may do, respondents consider it a matter of principle that they not be branded as "lawbreakers" because they do not agree that Jefferson County may license them.

Moreover, to our knowledge, federal income tax laws never make it "unlawful" to engage in any vocation, although other laws may prohibit such activities. Indeed, as Al Capone found out, federal tax laws make it unlawful to fail to pay taxes on all earnings, lawful or otherwise. But this Ordinance is being defended on the ground that it is an income tax law, and this highly unusual "unlawfulness" feature casts considerable doubt on the correctness of that defense, especially since the proper characterization of Ordinance 1120 for this case is a matter of

federal not state law. *Howard v. Commissioners of the Sinking Fund of Louisville*, 344 U.S. 624, 628 (1953). Furthermore, it would be perverse for an income tax law to forbid someone from earning a living as the price of not paying one's taxes since that is the primary means by which most people are able to pay their income tax liabilities, past or present.

There is another aspect of the statute that further confirms the conclusion that Ordinance 1120 makes it unlawful not to have a license, not just not pay the fee alleged to be due. Under section 1(F) (Pet. App. 131), the compensation on which the fee is based includes not only compensation received, but that which respondents are "entitled to receive from [their] employer." As the district court recognized (*id.* at 106 n.14), and the majority of the court of appeals specifically relied on in finding the fee to be a condition of work, not a tax on respondents' salary (*id.* at 46), the payment to petitioner is due once the work is performed, even if the pay is never received, making it comparable to a license fee for an Alabama attorney who pays \$250 bar dues at the beginning of the year and gets no rebate even if he or she never earns a dollar that year. Accordingly, because Jefferson County has chosen to make it unlawful for respondents to work as federal judges without paying the required fees, Ordinance 1120 is not an income tax statute, which is constitutional, but a licensing provision, which can not constitutionally be applied to respondents.⁹

⁹ In the district court, respondents stipulated that all federal district judges in the Northern District of Alabama except respondent Acker paid the occupational tax of the City of Birmingham and that respondent Clemon paid it on approximately 66 percent of his earnings as a federal judge. Pet. (continued...)

- *Second*, there is a broad exemption in Ordinance 1120 (mandated by section 4 of the authorizing legislation, Alabama Act No. 406, Pet. App. 127) that excludes from the licensing requirement any person who is otherwise licensed by the State or the county. See Section 1(B) (definition of vocation etc) (Pet. App. 130). It is not just doctors, lawyers, and a few other occupations and professions that are licensed, but, as noted above (p. 4) there are approximately 140 exemptions from petitioner's ordinance.

These exclusions are important for several related reasons. Initially, and most obviously, they underscore that this is a licensing scheme, not an income tax law because the exclusions are based on licensure, not on a lack of income, or income from sources (such as dividends or interest) not covered by the Ordinance. Thus, if a person working in Jefferson County has another license, that person is exempt from this licensing arrangement, regardless of how much, or how little, the person pays for that other license when compared to what he or she would pay under Ordinance 1120. As the majority below put it, "[w]e do not understand why, if the ordinance is an

⁹(...continued)

App. 115-16. Although the record does not reflect this fact, after this lawsuit was filed, respondent Clemon reviewed the Birmingham Ordinance and, upon discovering that it too contains similar "unlawful" language, directed the Administrative Office of the United States courts to cease withholding the tax from his salary. For the convenience of the Court, a copy of the current law, Birmingham Ordinance 97-184, December 23, 1997, which became effective on January 1, 1998, is being lodged with the Clerk and provided to petitioner and the United States.

income tax, it exempts from its requirement persons paying license fees to Jefferson County or to the State of Alabama, license fees that are totally unrelated to income." Pet. App. 46.

If Ordinance 1120 were a true income tax provision, it would handle the matter of other licenses in one of two ways: it could simply disregard whatever license fee is paid to another unit of government, or it could make an adjustment on account of that other payment. The first alternative is the one chosen by the City of Birmingham in its occupational tax. Although petitioner proclaims on several occasions (Br. 21, 25-26 n.9 & 34) that the City's ordinance and Ordinance 1120 are "identical," that is incorrect since the City has *no* exemption for those who pay license fees to the State or county. While the City taxes only earnings and not income such as dividends, interest, and capital gains, it is otherwise like the federal income tax and is fundamentally different from Ordinance 1120 because the City does not exempt persons who are otherwise licensed.¹⁰

The other alternative approach, which would be in keeping with most income taxes, would be to make some type of adjustment because of the license fees paid to other jurisdictions. Such an adjustment is not constitutionally mandated, but it would be permissible, and would lessen the impact of eliminating this exemption entirely. For example, the County could allow a dollar-for-dollar credit for license fees

¹⁰ Alabama's state income tax is also broad-based and has no exemption scheme like Ordinance 1120. Thus, the tax is owed by "[e]very individual residing in Alabama" and "[e]very nonresident individual receiving taxable income from property owned or business transacted in Alabama." Ala. Code 40-18-2(1) & (6).

paid to other jurisdictions, so that lawyers practicing in Jefferson County, and earning the same amount as federal judges, would pay \$250 in bar dues, and then subtract that amount from the \$668 that they would otherwise owe the County. Or, the County could allow a bar member to deduct the \$250 from his gross income, but that would reduce the payment to the County by only \$1.25 (1/2% of \$250). It might be that, either because the State's license fees were very high, or because the individual did not earn much money, no tax would be owed to the County, but that result would not be due to a wholesale exemption for those who are otherwise licensed by the State, regardless of how little they pay in State license fees.

It is not so much the inequity of allowing some persons who pay as little as \$5 per year to escape petitioner's licensing fees, no matter how much they earn, that makes Ordinance 1120 unconstitutional as applied to respondents. Rather, the exemption for other licenses makes clear, far beyond the name given to these fees and the other attributes of Ordinance 1120, that the program that it establishes is truly a licensing, not an income tax, scheme, and, therefore, Jefferson County may not constitutionally apply it to respondents.¹¹

¹¹ Respondents also believe that, because of this inequity, the Ordinance violates the Equal Protection Clause, as held by the Circuit Court in *Richards, supra*, note 4, although that claim was not made in this case. In addition, the district court correctly ruled that, because Ordinance 1120 was not passed until 1987, after both respondents were already federal judges, it was an unconstitutional diminution of their salaries, in violation of Article III. Pet. App. 105-111. Since the *en banc* court of appeals did not reach that issue (*id.* at 35), and it was (continued...)

B. *Ordinance 1120 Unlawfully Discriminates Against Respondents.*

There is another reason why this wholesale exemption makes Ordinance 1120 unconstitutional: it creates a discrimination that the Constitution and the Public Salary Tax Act forbid. The discrimination argument was raised, but rejected, in the district court (Pet. App. 89-90), and appears to have been abandoned, if not rejected in the court of appeals, including by those judges who agreed with respondents (Pet. App. 34 n.9). And when undersigned counsel of record entered this case when review was sought in this Court in 1998, no claim of discrimination was raised in the brief in opposition. Nonetheless, there is no barrier to this Court's considering the argument since it is no more than an alternative ground, using the same legal principles, for affirming the judgment below; the facts relating to it are all stipulated and have been the focus of much of the litigation; and the case on which it is based – *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) – is relied on heavily in the briefs of both petitioner and the United States. Most significant of all, petitioner's merits brief argues (at 33-35) that, because federal and state judges are treated alike, there is no discrimination, and hence Ordinance 1120 is valid.

The Public Salary Tax Act permits a state or political subdivision thereof to tax the "pay or compensation" of a federal officer or employee "if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 411. Thus, section 411 would plainly bar a tax that applied a higher rate to federal-source

¹¹(...continued)

not presented in the petition, it too is not before the Court.

income than to all other forms of income, or denied federal employees deductions that were available to others, or exempted state judges from a tax while taxing members of the federal judiciary. Although Ordinance 1120 does not single out federal employees for unfavorable treatment, it nonetheless discriminates in a manner that violates the holding of *Davis*.

In *Davis*, this Court held, with only Justice Stevens dissenting, that section 111 and the constitutional inter-governmental tax immunity principles on which it is based extend beyond prohibiting facial discrimination against federal workers. Under Michigan law, retirement payments for federal workers were treated the same as payments for retirees who worked for private employers; the only discrimination was in favor of state employees whose retirement benefits were not taxed. Despite the fact that federal workers were not singled out for unfavorable treatment, the *Davis* Court held that the anti-discrimination provisions of section 111 (and the constitutional principles that it embodies) applied. *Id.* at 813.

After noting that the standard of review under section 111 was less rigorous than under the Equal Protection Clause (*id.* at 816), the Court concluded that there was discrimination and that the reasons offered by the State did not justify the favored treatment for state retirees. The State had argued that the exclusion for state retirement benefits was appropriate because, on average, state employees received lower retirement benefits than did federal workers. *Id.* at 816-17. However, this Court ruled that more carefully tailored means were available to protect state employees who received smaller payments, without favoring those whose retirement pay exceeded that of federal workers. *Id.* Should petitioner seek to defend the discrimination caused by the total exclusion from Ordinance 1120 of those who pay license fees to the State, the answer is

the same: there are less discriminatory alternatives that take into account payments made for other licenses without creating a wholesale exemption.

Nor can it be argued that the Court in *Davis* failed to focus on how expansive a definition of discrimination it was creating. In his dissent, Justice Stevens pointed out that the Michigan law applied to 4.5 million people, of whom only 24,000 were federal and 130,000 were state retirees. *Id.* at 821. He further argued that section 411 was not a "most favored nation provision" (*id.* at 823), and that, since the same result could be achieved by increasing the size of state pensions, there was no reason to strike down this arrangement. *Id.* at 824. Petitioner's claim that, because there is parity of treatment between federal and state judges, Ordinance 1120 satisfies section 411, might well have survived under Justice Stevens' view, but it is surely inconsistent with the holding in *Davis*.

Finally, in contrast to its position here, the United States urged the Court to hold that the statute in *Davis* created an unlawful discrimination for essentially the reasons relied on by the majority. The Solicitor General's brief of September 1, 1998 (a copy of which is being provided to petitioner's counsel) specifically rejected the notion that, if retirees other than federal workers also received less favorable treatment, the discrimination did not offend section 111 or the constitutional immunity doctrines on which it is based. It further argued against the justifications offered by the State there, yet it supports the County here.

The only possible explanation for this radical change in the Government's position is that its brief here never mentions the wholesale exemptions for holders of state licenses, let alone analyzes their impact on the issue of discrimination (or on the

issue of whether the fees imposed are an income tax or constitute an unlawful attempt at licensure). In any event, whatever the reason may be for its change in heart, the Court should reject the arguments of the Solicitor General and find that Ordinance 1120 unlawfully discriminates against respondents.

C. *The Other Arguments Raised In Defense Of Ordinance 1120 Are Of No Avail.*

The Buck Act, 4 U.S.C. §§ 106 *et seq.*, which is heavily relied on by petitioner and the United States, also does not provide a defense for Ordinance 1120. Unlike the Public Salary Tax Act, which preceded the Buck Act by a year, the Buck Act is not an affirmative grant of power to the states (or a consent by the United States) to impose any tax. Rather, it does no more than remove a defense that might be raised if a state sought to tax the income of a person who works on a federal enclave that is part of a state or locality. Thus, as a complement to the Public Salary Tax Act, Congress provided that "No person shall be *relieved* from liability for any income tax levied by any State . . . by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area . . ." (emphasis added). But unless the tax is an income tax, the Buck Act is wholly irrelevant.¹²

¹² Nor does the broad definition of income tax in 4 U.S.C. § 110(c), which includes taxes that are "measured by . . . gross receipts," help petitioner. That definition, by its terms, is limited to "sections 105-109 of this title," which includes the Buck Act (section 106), but it does not include the Public Salary Tax Act (section 111), the only statute that permits a tax to be imposed.

In relying on the Buck Act, petitioners and the United States cite *Howard v. Commissioner of the Sinking Fund of Louisville*, 344 U.S. 624 (1953), and *United States v. City of Pittsburgh*, 757 F.2d 43 (3rd Cir. 1985). However, neither is of any help because the statutes in both cases are readily distinguishable on both of the grounds relied on by respondents. The statute in *Howard* is reproduced in note 2 of the opinion, and it does not, unlike Ordinance 1120, contain any provision making it "unlawful" to work without paying the tax that it imposes, nor are there are exclusions from it for those who pay other occupational license fees. Thus, contrary to the argument of the dissent below (Pet. App. 62) and of petitioner (Br. 37), the statute in *Howard* is neither "almost identically worded" to Ordinance 1120, nor "indistinguishable" from it. Furthermore, in contrast to this case, the taxpayers' principal argument in *Howard* was that, because the tax could not, as a matter of Kentucky law, be an income tax, it could not qualify for the benefits of the Buck Act. 344 U.S. at 628. Having rejected that argument, and in the absence of any other basis to challenge the categorization of the tax for Buck Act purposes as an income tax, the Court sustained the City's claims.

In *City of Pittsburgh*, the statute is not reproduced in the opinion, but its description is of a routine gross receipts tax, labelled a business privilege tax, that was applied to the sales of transcripts by a court reporter who worked for the federal court. There appears to have been no attempt by the City to "license" federal court reporters (who are employed by the federal government), nor to make it "unlawful" to fail to pay the tax. Finally, there were no exemptions for others who sold transcripts (either for private sector or public employees) of the kind involved here. Accordingly, given the significant differences between Ordinance 1120 and the statutes at issue in *Howard* and *City of Pittsburgh*, neither of those cases can

rescue petitioner.¹³

* * *

For all these reasons, the license fee imposed by Ordinance 1120 is not an income or other tax permitted by the Public Salary Tax Act or the Constitution. Rather, it is an attempt by Jefferson County to license federal judges as a condition of their performing their federal duties, and no Act of Congress, nor any decision of this Court, allows that to be done. Jefferson County is not powerless to raise revenues from those who work there, including federal officers and employees, but it cannot do so if it makes it unlawful to carry out the duties of a federal judge without paying a license fee, or if it continues to grant a wholesale exemption to those who hold licenses from the State of Alabama. Because the taxes that petitioner seeks to collect in this case are based on a law that contains these

¹³ Petitioner, but not the United States, also relies on 5 U.S.C. § 5520, and the regulations promulgated thereunder (Br. 30-32). Those provisions require the Secretary of the Treasury to enter into agreements for withholding certain taxes from the pay of federal officers and employees (including those in the judicial branch, for whom withholding is handled by the Administrative Office of the United States Courts). But petitioner stipulated in the district court that no such withholding has ever been made under Ordinance 1120 (Pet. App. 114, ¶ 10), which strongly suggests that no Secretary of the Treasury, nor anyone in the Administrative Office, has ever considered the license fee imposed by Ordinance 1120 to fall within section 5520. We do not contend that this fact is dispositive, but it does make it difficult to see how section 5520 helps petitioner.

constitutional defects, the County cannot prevail.

CONCLUSION

The judgment below should be affirmed.

Respectfully Submitted,

ALAN B. MORRISON
(Counsel of Record
for Judge U.W. Clemon)
DAVID C. VLADECK
ERICA CRAVEN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-7720

IRWIN W. STOLZ, JR.
(Counsel of Record for
Judge William M. Acker)
SEATON D. PURDOM
GAMBRELL & STOLZ, L.L.P.
4300 One Peachtree Center
303 Peachtree Street NE
Atlanta, GA 30308
(404) 577-6000

Attorneys for Respondents

February 22, 1999

Addendum

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY,
ALABAMA**

JASON RICHARDS, et al.,

PLAINTIFFS,

VS.

JEFFERSON COUNTY, et al.,

DEFENDANTS.

CASE NO. CV-92-3191

JUDGMENT

The Court has considered the evidence, argument and pleadings in this matter, along with the applicable statutes, ordinance and caselaw. After a consideration of same, the Court finds that Section 4 of Alabama Act 406(1967), and Section 1(B) of Jefferson County Ordinance 1120 (1987), are unconstitutionally violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:

1) Fairness is the notion underlying the concept of equal protection, and, as such, fairness must be examined when considering how a government treats its citizens. The unfair application of the County's occupational tax violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee.

2) The ordinance and statute in question each contain vague definitions which lead to subjective interpretations and inconsistent enforcement of the tax.

3) Many taxpayers pay a license fee and also pay an occupational tax, which is in direct conflict with Act 406.

4) The exemptions established by the statute and ordinance unjustly and unreasonably create a class of taxpayers who must bear the sole burden of providing occupational tax dollars for the County.

5) The exemptions are arbitrary, unfair and irrational.

Accordingly, it is hereby Ordered as follows:

(a) Defendant's motion to dismiss for want of jurisdiction is denied.

(b) The Jefferson County Commission shall have until January 15, 1999, to seek the removal of the unconstitutional exemptions from Ordinance 1120 through proposed legislation or to remove the occupational tax altogether. A hearing is set for January 19, 1999, at 10:00 a.m., at the Jefferson County Courthouse to determine if there has been compliance with the Court's order. The Court will also determine any proper injunctive relief required for compliance.

(c) A hearing is set for June 16, 1999, at 10:00 a.m. at the Jefferson County Courthouse for the Court to determine if the Alabama legislature has remedied Act 406, and if there has been corresponding action by the Jefferson County Commission with regard to Jefferson County Ordinance 1120.

(d) At the compliance hearing of June 16, 1999, the Court shall determine what amount, if any, should be refunded the class and subclass members. The Court shall also consider the issue of plaintiff's attorney's fees. The Court may also determine further injunctive relief.

(e) After January 19, 1999, there will be a separate order entered by this Court regarding the class and subclass members.

(f) The Court refrains jurisdiction of this matter.

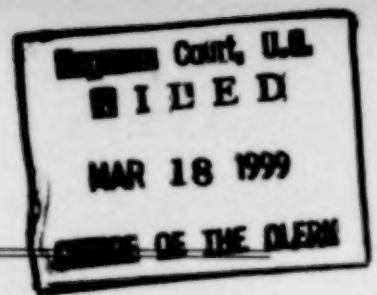
Done and Ordered this 12th day of November, 1998.

/s/ John E. Rochester

JOHN E. ROCHESTER

CIRCUIT JUDGE, SPECIALLY SITTING

(7)
No. 98-10



In The
Supreme Court of the United States
October Term, 1998

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM ACKER and U.W. CLEMON,

Respondents.

On Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

PETITIONER'S REPLY BRIEF

EDWIN A. STRICKLAND
JEFFREY M. SEWELL*
Jefferson County Attorney's Office
A-610 Courthouse Annex
716 North 21st Street
Birmingham, AL 35263
(205) 325-5688

**Counsel of Record*

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ARGUMENT

A. THE COUNTY'S REPLY TO THE JUDGES' ARGUMENTS ON THE MERITS

Introduction

The lynchpin of the judges' argument on the Supremacy clause issue is their premise that the consent to state and local taxation expressed in the Public Salary Tax Act, the Buck Act and 5 U.S.C. § 5520 is limited to traditional income tax and therefore does not include the county license tax. The error in that premise is revealed by reviewing the language of the three statutes.

The consent in the Public Salary Tax Act is not limited to any form of tax. The absence of the word "income" or other limiting adjective preceding the word "taxation" confirms Congressional intent to consent to all forms of non-discriminatory state and local tax on pay or compensation. That would include license tax. If Congress had intended to limit the consent in the Public Salary Tax Act to a traditional income tax as suggested by the judges it would have done so by using a narrow term like "income tax" instead of the much broader word "taxation".

The foregoing conclusion that the Public Salary Tax Act consents to the levy of license tax on federal employees is also confirmed by the language used in the subsequent Buck Act. There Congress expressly included license tax in its description of the taxes which federal employees are required to pay. It is axiomatic that Congress would not require federal employees pursuant to the Buck Act to pay a license tax to which it had not consented in the Public Salary Tax Act. That conclusion is

also confirmed by the language used in Title 5, United States Code, § 5520, through its implementing regulation 31 C.F.R. § 215.2, which also expressly includes license tax in the description of the local taxes which federal paymasters are to withhold and remit to local taxing authorities. It is axiomatic that Congress would not direct federal paymasters pursuant to 5 U.S.C. § 5520 to withhold and remit to local taxing authorities a license tax to which it had not consented in the Public Salary Tax Act.

Review of the language used in the three statutes confirms the opposite of the judges' premise. Congress did consent to the levy of license tax on the pay of federal employees provided only that the tax not discriminate against the employee on account of the source of compensation. Therefore, it makes no difference whether the county tax is an income or license tax because Congress has consented to both forms of tax on pay or compensation. The hairsplitting over that distinction in the judges' brief and the court of appeals' opinion leads nowhere. We urge the Court not to become embroiled in the minutia of the judges' abstract argument as the court of appeals did and lose sight of the fact that Congress has already rendered their immunity argument moot by waiving their immunity.

1. The Public Salary Tax Act, 4 U.S.C. § 111

With regard to the Public Salary Tax Act the judges make two arguments: (a) The Public Salary Tax Act does not consent to a license tax and (b) a tax with exemptions amounts to "discrimination against occupations" which violates the Public Salary Tax Act.

(a) The Public Salary Tax Act does consent to a license tax

The judges suggest without citing any authority that the county license tax is not included in the consent contained in the Public Salary Tax Act. That Act simply states that Congress consents to "taxation on pay or compensation" by a state or local taxing authority. As discussed in the introduction above, Congress could have but did not limit the broad term "taxation". Since the term taxation is not limited it is reasonable to conclude that Congress intended that it include all forms of non-discriminatory local tax including license tax. That conclusion is confirmed by the fact that license tax is expressly included in the both the Buck Act and 5 U.S.C. § 5520, as implemented by 31 C.F.R. § 215.2. It follows that Congress would not direct federal paymasters pursuant to 5 U.S.C. § 5520 to withhold a license tax to which it did not consent. Nor would Congress require pursuant to the Buck Act that federal employees who work and reside in a federal area pay a license tax to which it did not consent. It is unreasonable to interpret the Public Salary Tax Act in a manner that would leave those two subsequent statutes with no field of operation.

Moreover, in deciding *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953), this Court must have concluded that the Public Salary Tax Act consented to the levy of the Louisville license tax. Otherwise, there would be no basis for the Court requiring any federal employee to pay the Louisville tax. The Court's conclusion is confirmed by the last sentence of the next to last paragraph of the opinion, 344 U.S. at 629, where the Court held:

By virtue of the Buck Act, the tax can be levied and collected within the federal area *just as if it were not in a federal area.*

Id.

That sentence raises the question: from where did the city obtain the authority to collect the license tax from federal employees in non-federal areas? The only possible answer is from the Public Salary Tax Act.

The judges reach their opposite conclusion about the Public Salary Tax Act only by interpreting it in a vacuum without reference to the other two statutes; a practice disfavored by this Court.

... statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

Davis v. Michigan Dept. Of Treasury, 489 U.S. at 809.

One flaw in the judges' interpretation is illustrated by considering what would happen if they were right. The Buck Act would then be the only source of Congressional consent to license tax but it is limited to federal areas. Respondents and the *amici* judges both suggest that a federal area does not include a courthouse. That would mean Congress intended that only *some* federal employees pay license tax depending on the area where they work. The facts of *Howard v. Commissioners* illustrate the inequality and illogic of their interpretation. The federal employees who reside and work on the military base in Louisville, Kentucky would have to pay Louisville's license tax but the other federal employees working in

the downtown courthouse would escape the tax. Acceptance of the judges' interpretation leads to the illogical and improbable conclusion that, with respect to license tax, Congress intended to create two classes of federal employees, a favored class which includes judges who escape license tax and a non-favored class which includes others who pay license tax. There is nothing in the plain language of the Public Salary Tax Act, the Buck Act, 5 U.S.C. § 5520 or their respective legislative histories which support that result.

Like Alabama and Kentucky, most states prohibit their cities and counties from collecting a traditional income tax and only allow them to raise revenue from license and sales taxes. That reality was recognized in the Senate Finance Committee report on the Buck Act and was *the* reason Congress deliberately chose to define the term income tax in the Buck Act as including local license tax:

[t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different state laws. The intent of your committee in laying down such a broad definition was to include therein any state tax, whether known as a corporate-franchise tax, or business privilege tax, or any other name if it is levied on, with respect to or measured by net income, gross income or gross receipts.

* * *

The Buck Act "income tax" broadly defined as it is, refers to the broad, generic class of taxes upon income. It does not require that the tax be denominated an income tax or that it conform to

the federal income tax. If the tax in question is based upon income and is measured by that income in money or money's worth, if a net income tax, gross income tax or gross receipts tax, it is an "income tax".

Report of Senate Finance Committee, quoted in *Humble Oil and Refining Company v. Calvert*, 478 S.W.2d 926, cert. denied, 409 U.S. 967 (1972).

If adopted by the Court, the judges' interpretation of the Public Salary Tax Act would have far reaching and devastating consequences on many cities and counties in the United States that depend on license taxes as their primary revenue source. The Court's holding would effectively exempt *all* federal employees (except in the handful of municipal jurisdictions like Washington D.C. which levy a traditional income tax) from sharing in the cost of their local government. The loss of revenue from the large numbers of persons with a federal employment connection who would claim an exemption (in Jefferson County there are approximately 12,000), would threaten the solvency of many local governments. As a result the ability of cities and counties to provide vital public services would be substantially impaired. Immunizing several judges from the county tax is an insufficient reason for the Court to loosen such havoc on the legal landscape which has worked well for more than sixty years with respect to each sovereign's ability to tax the pay of the other's employees. Immunizing several judges is also insufficient reason to resurrect notions of tax immunity that the Court and Congress abandoned in the 1930's.

(b) The judges' new discrimination argument.

The judges' brief contains a new discrimination argument made now for the first time *seven years after this litigation commenced*. The judges' new argument, echoed in the *amici* judges' brief, is that the county tax discriminates against *occupations*. Without explaining how, the judges extrapolate that a tax which contains exemptions violates the Public Salary Tax Act. At the outset the Court is advised that there is no evidence in the record to support the judges' claim. The Court is reminded that the trial court correctly found that "the county tax does not discriminate against the federal officer or employee because of the source of his pay or compensation" (Pet. App. 89-90). The judges failed to appeal that finding. Noting their failure to appeal or address the finding, the court of appeals stated: "[o]n this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it." (Pet. App. 34, n. 9.)

The premise of the judges's new argument is that exemptions in a tax equate to a violation of the Public Salary Tax Act.¹ That premise is erroneous because the

¹ At footnote 4 of their brief the judges erroneously state that *Richards v. Jefferson County*, Jefferson County Circuit Court Number CV 92-319, and pending legislation may eliminate the controversy in this case. There is no legislation pending which would exempt federal judges from the county tax. The Court is advised that the *Richards*' trial court recently entered a non-final order which *may* eliminate the judges' new discrimination argument. That order declares that the portions of Act 406 and Ordinance 1120 which exempt persons required to pay state license tax violates the equal protection clause of the federal

Public Salary Tax Act does not require that a tax be free of exemptions. That is confirmed by *Howard v. Commissioners* where the Louisville license tax contained exemptions like the county tax. (See discussion of Louisville tax exemptions, *infra*.) According to the judges, the presence of those exemptions would render Louisville's tax invalid and the case wrongly decided by the Court. Further, since most states' income tax laws (including Alabama) exempt charitable, religious and governmental entities and certain individuals who are disadvantaged or earn less than a threshold amount, the judges would have the Court find those taxes are also invalid as applied to federal employees. The county knows of no tax, federal, state or local which does not contain some form of exemption. If the presence of an exemption violates the Public Salary Tax Act then it follows that federal employees escape all state and local tax. But, the mere presence of an exemption is not the test Congress chose to determine whether a tax violates the Public Salary Tax Act.

The correct and only test in the Public Salary Tax Act is whether the tax discriminates against the federal

Constitution. Since the Act and Ordinance have severability clauses the order's effect, if it survives appeal, would be to remove the exemptions from the county's tax thereby eliminating the judges' new discrimination argument. However, a jurisdictional defect in the *Richards* case related to the plaintiffs' failure to serve the Alabama Attorney General with the summons and complaint may result in the *Richards* case being dismissed. Under Alabama law serving the Attorney General is an absolute jurisdictional requirement in cases, like *Richards*, which challenge the constitutionality of a state statute. That issue is presently before the Alabama Supreme Court.

employee on account of the source of that employee's compensation. With regard to the county tax, the flaw in the judges' argument is illustrated by considering domestic employees in the home. They are exempt from the county tax. If, for discussion purposes, the White House were located in Birmingham the domestic federal employees would be exempt from the county tax, not because of the identity of their employer or their source of compensation but because the occupation itself is exempt. The same is true for ministers. An Army chaplain assigned in the county would be exempt along with all other ministers, not because of the identity of his employer or the source of his compensation but because the occupation itself is exempt. Unlike the Michigan state income tax in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), the exemptions from the county tax are available regardless of the identity of the employer or the source of the compensation. The violation in the *Michigan* case occurred by Michigan providing favorable treatment to a class of persons because of the identity of their employer - the source of their compensation (i.e. state retirees). The county tax creates no classes, favorable or unfavorable, based on the identity of an employer or the source of the taxpayer's compensation. That pivotal difference renders the holding in *Davis v. Michigan Department of Treasury* inapposite to this case.

The County tax does not favor or discriminate against anyone on account of the identity of their employer or the source of their compensation. This satisfies the only requirement of the Public Salary Tax Act.

2. The Buck Act, 4 U.S.C. § 105-109

Respondents and the *amici* judges suggest that the Court define the Buck Act term "federal area" so as to carve out a federal courthouse or other federal building where judges work. The Buck Act's definition of the term "federal area" is unambiguous: "lands or premises held or acquired for the use of the United States or any department, establishment or agency of the United States" There is nothing in that definition which could reasonably be interpreted to exclude a federal courthouse. The plain language is very broad and includes *all land or premises* used by every department or agency of the federal government. That would obviously include buildings such as a federal courthouse. As discussed in section 1 above, it is illogical to interpret the Buck Act as creating two classes of federal employees with some paying license tax and others escaping license tax based on where they work.

3. 5 U.S.C. § 5520

In their brief respondents state that no federal paymaster has withheld or remitted the county tax pursuant to 5 U.S.C. § 5520. They are wrong. All federal paymasters *except the Administrative Office of Courts* have withheld and remitted the county tax.

4. *Howard v. Commissioners*, 344 U.S. 624 (1953)

Like the dissent on the court of appeals, respondents and the *amici* judges recognize that if *Howard v. Commissioners* cannot be distinguished from this case it compels

the conclusion that they are liable for the county tax. The judges therefore attempt to distinguish *Howard* with the argument that the Louisville tax: (a) contains no language which makes it unlawful to work without first complying with the ordinance and (b) contains no exemptions for domestic servants, ministers, state taxed occupations, etc. *They are wrong.*

(a) The city of Louisville tax makes it unlawful to perform work in that city without paying the tax.

Respondents and the *amici* judges erroneously informed the Court that the Louisville Ordinance does not make it unlawful to work without first complying with its Ordinance. Section 112.99, Louisville, Kentucky Occupational Tax Ordinance provides:

§ 112.99 PENALTY.

(A) Any person who shall engage within the city in any business, profession, occupation, or other activity subject to the license fee imposed under this chapter and who shall fail to apply for an occupational license fee reporting number and to complete the questionnaire as required by § 112.05 shall be subject to a fine of not more than \$100.

* * *

A complete copy of the Louisville occupational tax ordinance has been lodged with the Court and provided to counsel. The Court is invited to read the remainder of § 112.99 which describes substantial additional unlawful conduct.

The judges make much of the term "unlawful" in the County's Ordinance 1120 but the term is actually insignificant. An Alabama county has no inherent authority or jurisdiction to make laws. That fundamental proposition was succinctly stated by the Alabama Supreme Court in *Tuscaloosa County v. Alabama Great Southern Railroad Company*, 227 Ala. 429, 150 So. 328 (1933) as follows:

A county is but a governmental agency possessing no power and subject to no duty not originating from the law by which it is created, and in which its functions are defined. Whatever of power may be delegated to the county is the power of the state, and its nature is not changed by the delegation. [Citations omitted] A county has no inherent jurisdiction to make laws.

227 Ala. at 432.

The state's delegation of the power to tax in Act 406 does not criminalize non-payment of the tax. No other provision of Alabama law criminalizes non-payment of the County tax. Therefore, the county is without power to criminally prosecute delinquent taxpayers and cannot prevent the Respondents from performing their duties as federal judges. The county's only remedy is a civil suit to collect the tax. The use of the term "unlawful" in Ordinance 1120 is synonymous with saying it is unlawful to refuse to pay any civil debt.

In a related argument the judges suggest that the county tax purports to regulate their performance of duties. The county occupational tax was levied for one purpose, to raise revenue for the operation of county government. Act 406 does not authorize the county to regulate or control any profession. As set forth in the

affidavit of Randy Godeke [R1-25-29] the county has never attempted to regulate or control any profession through the levy of the occupational tax. Moreover, the county does not even issue licenses to the taxpayers. It is undisputed that the county has never attempted in any manner to regulate, direct or control the activities of the federal judge. Respondents admitted in their interrogatory answers that the county has never attempted to restrain, obstruct, arrest, prosecute or otherwise regulate them in the performance of their duties. [See Respondents' answers to the county's interrogatories 22-26, Acker's answer at R1-25-50, Clemon's answer at R1-25-57] The levy of occupational tax on Respondents' wages no more regulates their activities than the levy of income tax thereon by the state of Alabama.

(b) The city of Louisville tax exempts certain state taxed occupations, ministers and domestic servants.

Respondents and amici judges erroneously informed the Court that Louisville's occupational tax does not contain exemptions. Section 112.15, Louisville, Kentucky Occupational Tax Ordinance provides:

§ 112.15 EXEMPTIONS.

(A) Insurance companies, corporations, firms, individuals, or associations who are licensed under §§ 112.25 through 112.32 are not required to pay a license fee measured by net profits under the terms of this chapter.

(B) Because of the great costs of administration and difficulty of collection involved, domestic servants employed in private homes are exempt

from the terms of this chapter and no license is required.

(C) The occupation of serving as a duly ordained minister of religion is exempted from the terms of this chapter and no license fee is required. . . .

* * *

The Court is invited to read the remainder of § 112.15 to consider the many other exemptions.

Respondents fail in their effort to distinguish Louisville's tax from the county tax because the two taxes are indistinguishable. They both make it unlawful to work without paying the tax. They both contain nearly identical exemptions. They are both license taxes under state law. They are both income taxes under the Buck Act. The Court should apply the same reasoning as it did in *Howard v. Commissioners* to find that the Buck Act definition of the term "income tax" should be applied to the county tax without regard to its state law denomination. The county tax is an income tax under that Buck Act definition because the tax is measured by gross receipts. Therefore, the Court should hold that the judges are liable for the county tax under the Buck Act in line with *Howard v. Commissioners*.

5. *Johnson v. Maryland*, 254 U.S. 51 (1920)

The judges cite *Johnson v. Maryland*, (holding state cannot require postal employee to submit to driver's license law) for the proposition that the Supremacy clause prohibits a county from licensing a federal employee. We

agree that, *absent Congressional waiver*, the Supremacy clause would preclude a state from subjecting a federal employee to a driver's license law. *Johnson v. Maryland* was correctly decided in 1920 because Congress had not yet waived federal employees' Supremacy clause immunity from state driver license laws. However, Congress has now partially waived that immunity by not only consenting but requiring states to license federally employed drivers of commercial vehicles. See 49 U.S.C. § 31301-31317 (§ 31301(7) & (8) defining "employee" and "employer" to include the United States) and 49 C.F.R. § 383.5 (including federal employees in the state licensing of federal commercial vehicle drivers). There is nothing in the foregoing statutes or regulations that exempts Postal Service employees from the requirement, therefore, it appears that Congress has legislatively overruled *Johnson v. Maryland* by waiving the Supremacy clause immunity on which that case was decided.

The foregoing illustrates how Congress can waive a federal employee's immunity from state licensing laws. We submit that Congress waived federal employees' immunity from non-discriminatory state and local license tax in the same manner by enacting the Public Salary Tax Act, the Buck Act and 5 U.S.C. § 5520.

B. THE COUNTY'S REPLY TO THE JUDGES' ARGUMENTS ON JURISDICTION

With regard to the jurisdiction issue, the judges make two arguments: (a) the Tax Injunction Act is not a jurisdictional barrier; it merely prohibits a federal court from using an injunction to interfere in state tax matters and

(b) the Federal Officer Removal Statute overrides the Tax Injunction Act.

(a) The Tax Injunction Act is a jurisdictional barrier.

Respondents and the *amici* judges make the same argument the Court heard in *California v. Grace Brethren Church*, 457 U.S. 393 (1982). There the Court was urged to construe the Tax Injunction Act as narrowly as possible and hold that it does not operate as a jurisdictional barrier but only precludes a federal court from enjoining the collection of a state tax. Recognizing (a) that the Congressional purpose for enacting the Tax Injunction Act was to prevent federal court interference *in any manner* with state tax matters and (b) that the suggested narrow construction would leave federal courts free to interfere in state tax matters with every means short of an injunction thereby defeating the purpose of the Tax Injunction Act, the Court rejected the argument. The following quotes from its opinion demonstrate the Court's reasoning:

... because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act. ...

457 U.S. at 408.

* * *

Nevertheless, the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, *as about divesting the federal courts of jurisdiction to interfere with state tax administration.* [Emphasis added]

457 U.S. at 408, fn. 22.

* * *

Consequently, because Congress' intent in enacting the Tax Injunction Act was to prevent federal court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief.

457 U.S. at 411.

We urge the Court not to reverse its holding or reasoning in *Grace-Brethren Church*. There is no reason in this case to abandon the long standing rule of federal non-interference with state taxation as urged by the judges. Instead, the Court should use this case to ratify the proposition that the Tax Injunction Act is a jurisdictional barrier and that it applies whether a taxpayer brings the case to federal court by removal or by filing the initial complaint. The Court is reminded that it was the judges, not the county, who brought this case to federal court. Therefore, this case does not present the question of whether the Tax Injunction Act bars a taxing authority from suing in federal court to collect a tax and the Court need not decide that question to resolve this case. Whether by removal or by filing the complaint initially, the judges are seeking exactly what is forbidden by the Tax Injunction Act, federal interference with the

collection of state tax. We urge the Court to strengthen, not weaken, the concept of federal non-interference in state taxation and the Tax Injunction Act.

(b) The judges' interpretation of the federal officer removal statute defeats the purpose of the Tax Injunction Act.

Respondents and the *amici* judges suggest that the Court apply a rule of statutory construction and hold that statutes like the Federal Officer Removal Statute which grant jurisdiction should be broadly construed and statutes like the Tax Injunction Act which withhold jurisdiction should be narrowly construed. Under that rule of construction the Federal Officer Removal Statute would restore the jurisdiction extinguished by the Tax Injunction Act.² If adopted by the Court, the same reasoning could be applied by the lower courts with equal force to other jurisdiction granting statutes like the federal question and diversity statutes. The same rule of construction

² The county wishes to make it clear that it does not agree that § 1442 provides a basis for the judges to remove this case to federal court. That statute permits removal only where a federal officer is sued in state court for actions taken under color of office or in the performance of duties. The judges' duties do not require them to refuse to pay taxes. Their refusal to pay was a private action without authority from and against the advice of their employer, the United States. Their refusal to pay was also unrelated to any judicial act or proceeding and could not possibly be an act performed under color of office. The judges fail both tests for removal under § 1442. In the county's opinion that renders the Tax Injunction Act issue moot since there was no federal jurisdiction at the outset.

would compel the same conclusion; that the federal question and diversity statutes should be read broadly to restore the jurisdiction extinguished by the Tax Injunction Act. The Tax Injunction Act would then have no field of operation.

Rules of statutory construction are not used to interpret unambiguous statutes. *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997); *Reves v. Ernst & Young*, 507 U.S. 170 (1993). The Tax Injunction Act is unambiguous. Its legislative history, quoted at footnote 22 of the *Grace Brethren Church* opinion, leaves no doubt and this Court has already held that its purpose is to deprive federal courts of jurisdiction to interfere in any manner in state tax matters. It follows that if the Act operates to deprive courts of jurisdiction, it makes no difference where that jurisdiction originated. Regardless of its source, the jurisdiction is extinguished by the Tax Injunction Act. The county agrees with the court of appeals' reasoning on this issue and urges the Court to adopt its holding. That would be consistent with this Court's admonition that "federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text". *Arkansas v. Farm Credit Services*, 117 S.Ct. 1776, 1780 (1997).

C. CONCLUSION

With regard to the jurisdiction issues, the county requests the Court to: (1) hold the case was improperly removed because the judges' refusal to pay the tax was not done in the performance of their duty or under color

of their office; or (2) hold that the Tax Injunction Act deprived the district court of jurisdiction over this case; and, (3) hold that the judicial exception to the Tax Injunction Act is not available because the United States is not a co-party. The case should be remanded to state court for lack of jurisdiction.

With regard to the Supremacy clause issue, the county requests the Court to hold that, because Congress waived the judges' immunity from the county tax, Supremacy clause and intergovernmental tax immunity violations did not occur. The court of appeals should be reversed and judgment entered in favor of the county in line with *Howard v. Commissioners*.

The county reminds the Court that the trial court also found that the county tax violated the Compensation clause but the court of appeals failed to address that issue. In the event the Court rules for the county, the Court should either rule on the Compensation clause issue or remand the case to the court of appeals for consideration of that issue.

Respectfully submitted,

EDWIN A. STRICKLAND

JEFFREY M. SEWELL*

Jefferson County Attorney's Office

A-610 Courthouse Annex

716 North 21st Street

Birmingham, AL 35263

(205) 325-5688

*Counsel of Record

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No. 98-10

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

JEFFERSON COUNTY, ALABAMA, PETITIONER

v.

WILLIAM M. ACKER AND U. W. CLEMON

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

SETH L. WAXMAN

Solicitor General

Counsel of Record

LORETTA C. ARGRETT

Assistant Attorney General

LAWRENCE G. WALLACE

Deputy Solicitor General

KENT L. JONES

*Assistant to the Solicitor
General*

DAVID ENGLISH CARMACK

Attorney

Department of Justice

Washington, D.C. 20530-0001

(202) 514-2217

3508

QUESTIONS PRESENTED

1. Whether there was subject matter jurisdiction over this action in the district court.
2. Whether a county government may impose a nondiscriminatory "occupational" tax upon the pay or compensation of federal judges.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-10

JEFFERSON COUNTY, ALABAMA, PETITIONER

v.

WILLIAM M. ACKER AND U. W. CLEMON

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

This case involves the effort of an Alabama county to collect its local “occupational” tax from the federal district judges who work in that county. After the County commenced this tax collection case in state court, the federal judges removed the case to federal district court. This Court has directed the parties to address (i) the effect of the Tax Injunction Act, 28 U.S.C. 1341, on this suit and (ii) whether the county tax is constitutional as applied to the federal judges. The United States has a substantial interest in both of the questions presented and, in response to this Court’s invitation, filed a brief in response to the petition at an earlier stage of this case.

STATEMENT

1. In 1967, the State of Alabama authorized its counties to impose "a license or privilege tax upon any person" who engages in a business or profession within the county and who is not required by any other law to pay such a tax to the county or the State (1967 Ala. Acts No. 406, § 4; Pet. App. 126-127). Pursuant to that authority, the Jefferson County Commission enacted the "Occupational Tax of Jefferson County, Alabama" in 1987 (Jeff. Cty. Ord. 1120 (Sept. 29, 1987); Pet. App. 129-139). Section 2 of the Ordinance states that it (Pet. App. 132):

shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession * * * within the County * * * without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

The term "gross receipts" is defined by Section 1(F) of the Ordinance (Pet. App. 131) to include:

the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered.

The term "gross receipts" does not include any compensation earned outside Jefferson County. Jeff. Cty. Ord. 1120, § 3; Pet. App. 132-133.

Jefferson County ordinarily collects its "occupational" tax from employers, who withhold the tax from

employee wages. In the absence of withholding, however, employees are required to remit the taxes directly to the County. Jeff. Cty. Ord. 1120, §§ 4, 5; Pet. App. 133-135. Persons who fail to comply with the Ordinance are subject to interest and penalties on the unpaid balance of the taxes. Jeff. Cty. Ord. 1120, § 10; Pet. App. 137-138. There are no criminal penalties for failing to pay the County's occupation tax (Pet. App. 31).

2. Respondents are federal district judges for the Northern District of Alabama. Many, but not all, of their duties as federal judges are performed at the federal courthouse located in Jefferson County. Pet. App. 32-33. The Jefferson County Ordinance therefore applies to respondents and obligates them to pay an "occupational" tax of one-half of one percent of their "gross receipts" from the services they perform within the County. Jeff. Cty. Ord. 1120, § 2; Pet. App. 32. The Administrative Office of the United States Courts has not withheld the county taxes from respondents' wages (*id.* at 30), and respondents have not paid the taxes directly (*id.* at 3, 32).

3. a. The County brought suit against respondents in the state district court for Jefferson County to collect the unpaid taxes (Pet. App. 3). Invoking 28 U.S.C. 1442(a)(3), respondents removed the action to the United States District Court for the Northern District of Alabama (Pet. App. 3, 32-33, 82). That statute authorizes the removal to federal court of any civil or criminal proceeding commenced in a state court against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties." 28 U.S.C. 1442(a)(3).

b. On cross motions for summary judgment, the district court held the county "occupational" tax to be

unconstitutional as applied to federal judges (Pet. App. 82-116). The court reasoned that, even though the tax was calculated by reference to the income earned by respondents and was not imposed on the United States, the tax directly interfered with the operations of the federal judiciary and therefore violated the "intergovernmental tax immunity" doctrine derived from the Supremacy Clause of Article VI of the Constitution (Pet. App. 91-105). The court further concluded that application of the county tax to respondents would effect a reduction in their compensation in violation of the Compensation Clause of Article III of the Constitution (Pet. App. 105-111).

4. A panel of the court of appeals reversed. 61 F.3d 848 (1995). The panel noted that the county tax (i) applies to all forms of employment and does not discriminate against federal judges (*id.* at 852-853) and (ii) is not imposed on the federal government directly (*id.* at 853-856). The panel concluded that the county tax is constitutional because, both in operation and effect, it taxes only the income that respondents derive from employment (*id.* at 855):

[O]nly if a federal employee is compensated [does] he or she become[] liable to Jefferson County for the occupational tax. A federal employee in Jefferson County could refuse to pay any license fees and still lawfully perform his or her federal duties under the ordinance *so long as that employee received no income from performing those duties*. Consequently, the occupational tax is not a *precondition* to the performance of any federal government functions but a *consequence* of receiving any compensation therefor.

Because the county has simply imposed a nondiscriminatory "income tax" on respondents (*id.* at 856), the panel concluded that the tax does not violate the intergovernmental tax immunity doctrine and does not unconstitutionally diminish respondents' compensation (*id.* at 856-857).

5. a. On rehearing en banc, the court of appeals vacated the panel decision and affirmed the district court (Pet. App. 26-61), with three judges dissenting (*id.* at 62-74). The court of appeals acknowledged that, under this Court's decision in *Graves v. New York*, 306 U.S. 466 (1939), if the county tax were merely an "income tax" on federal employees, it would not violate the doctrine of intergovernmental tax immunity (Pet. App. 44). The court further recognized that it is a question of federal law whether the county tax is, in substance, an "income tax" for this purpose. The court nonetheless concluded that it would look to state law to determine "the attributes comprising the substance" of the county tax (*ibid.*).

The court noted that, in *McPheeter v. City of Auburn*, 259 So. 2d 833 (1972), the Alabama Supreme Court stated that a local occupational tax constitutes a license or "privilege" tax—rather than an income tax—under state law (Pet. App. 44-45). Based upon the theory that the county tax is imposed on the "privilege" of performing the federal judicial function, rather than on the "income" of the federal judges, the court of appeals held that the tax violates the doctrine of intergovernmental tax immunity (*id.* at 45-46):

The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance

No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Although the court acknowledged that the "legal incidence" of the county tax falls on respondents as individuals, the court concluded that the actual incidence of the tax is on the "privilege" of performing judicial duties. *Id.* at 47-48, 50. The court stated that federal judges are "federal instrumentalities" in their performance of judicial duties and that the county tax thus "amounts to a direct tax on federal instrumentalities in violation of the intergovernmental tax immunity doctrine." *Id.* at 50.

b. The court of appeals then considered whether Congress has consented to the imposition of such taxes. The court held that the Public Salary Tax Act—in which Congress consented to taxation of the "pay or compensation" of federal officers or employees (4 U.S.C. 111)—does not consent to imposition of a "privilege" tax on federal judges (Pet. App. 54-56). The court distinguished *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (1985), in which the Third Circuit held that a local "privilege" tax was, in substance, an "income tax" that could be imposed under the Public Salary Tax Act on the official transcript fees received by a federal court reporter (Pet. App. 56-57 n.19). The court of appeals stated, without elaboration, that the ordinance involved in *City of Pittsburgh* "did not include the factors" that made the Jefferson County ordinance a "privilege" tax (*ibid.*).

The court of appeals also held that the Buck Act does not consent to the imposition of a "privilege" tax on federal judges (Pet. App. 57-61). That statute provides

that "[n]o person" is to be relieved of liability for a state or local "income tax * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area" (4 U.S.C. 106(a)). The statute defines the term "income tax" to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c). The court of appeals acknowledged that the county tax is "within the Buck Act's definition of an 'income tax'" (Pet. App. 58). The court stated, however, that the Jefferson County tax on the "privilege" of working as a federal judge is a direct tax on "the United States or an[] instrumentality thereof" (4 U.S.C. 107(a)) and is therefore prohibited by the express terms of the Act (Pet. App. 58).

In reaching this conclusion, the court of appeals sought to distinguish this Court's decision in *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624 (1953). In *Howard*, the Court held that the Buck Act authorized application of a Louisville tax on the "privilege" of conducting business to persons who were employed at a naval ordnance plant located within the city. *Id.* at 627-629. The court of appeals stated that the sole question in *Howard* was whether "Louisville lacked jurisdiction to tax in a federal area" (Pet. App. 60). By contrast, the court stated, the issue in this case is whether the local tax is a direct tax on a federal instrumentality that violates the intergovernmental immunity of the United States (*ibid.*). The court stated that the fact "that *Howard* upheld the application of the Louisville license fee to federal employees does not imply that the Buck Act precludes an intergovernmental tax immunity challenge to the application of Ordinance No. 1120 to federal judges" (*id.* at 61). The court explained that (*ibid.*):

Unlike federal judges, employees of a naval ordnance plant realistically can be viewed as separate entities from the federal government when performing their duties.

c. Because the court of appeals concluded that the challenged tax violates the intergovernmental tax immunity of the United States, and is not authorized by the Public Salary Tax Act or the Buck Act, the court stated that it was unnecessary to address the question whether the tax also violates the Compensation Clause of Article III of the Constitution (Pet. App. 35).

6. On Jefferson County's petition for a writ of certiorari (No. 96-896), this Court invited the Solicitor General to file a brief stating the views of the United States. In our brief in response to the Court's invitation (Pet. App. 176-196), we agreed with petitioner that the court of appeals erred in concluding that the county tax is unconstitutional as applied to federal judges. Because the decision in this case conflicted with the decision of another circuit, we suggested that the petition for certiorari be granted.¹

On June 9, 1997, this Court granted the County's petition for a writ of certiorari, vacated the judgment and remanded the case to the court of appeals for further consideration in light of the Court's recent decision in *Arkansas v. Farm Credit Services*, 520 U.S.

¹ We also noted (Pet. App. 184-185) that the parties and the court below had not addressed whether the suit had been properly removed under 28 U.S.C. 1442(a)(3). That statute authorizes removal only if the claim against the federal court officer was "for any act under color of office or in the performance of his duties." *Ibid.* We suggested that the receipt of personal income may not be an "act under color of office or in the performance of * * * duties" and that this jurisdictional issue should be addressed if certiorari were granted.

821 (1997). See 520 U.S. 1261 (1997). The *Farm Credit Services* case involved the Tax Injunction Act, 28 U.S.C. 1341, which directs federal district courts not to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." In *Farm Credit Services*, the Court reaffirmed its longstanding conclusion that this Act does not apply to suits brought by the United States on behalf of itself or its instrumentalities. 520 U.S. at 823-824. The Court further held, however, that entities such as Production Credit Associations—which engage in commercial activity and do not exercise governmental authority—are subject to the prohibitions of the Tax Injunction Act unless the United States joins the suit as a co-plaintiff. *Id.* at 824, 826-832.

7. On remand, the en banc court of appeals held that the Tax Injunction Act does not bar the district court from proceeding in this case. Adhering to its prior decision on the merits of the case, the court again affirmed the judgment of the district court (Pet. App. 1-23). Four judges dissented on the merits and three judges dissented on the application of the Tax Injunction Act (*id.* at 23-25).

The majority first concluded that jurisdiction exists in this case under 28 U.S.C. 1442(a)(3), which authorizes the removal to federal district court of any "civil action * * * commenced in a State court" against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties." The court held that it may proceed in this case notwithstanding the Tax Injunction Act because the federal judges who removed the case to federal court qualify as "instrumentalities" of the United States. The court reasoned that, "[a]s one of the three branches of

the federal government, the federal judiciary's interests are congruent with, if not identical to, those of the United States" (Pet. App. 20) and that, when a federal judge performs his judicial function, he is exercising the judicial power of the United States (*ibid.*).

SUMMARY OF ARGUMENT

1. The Tax Injunction Act generally provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. 1341. As some courts have noted, this statute does not on its face bar federal jurisdiction over a "suit * * * filed to collect a state tax, rather than enjoin, suspend, or restrain the collection of taxes." *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 818 (5th Cir.), cert. denied, 498 U.S. 897 (1990). Because this case was brought by the county to collect its tax, and was not brought by respondents to enjoin collection, the text of the Tax Injunction Act is not directly applicable here.

Nor is the underlying purpose of the Tax Injunction Act implicated in such a suit. In enacting this statute in 1937, Congress expressly modeled it upon the similar text of the federal statute which, since 1867, has deprived courts of jurisdiction over suits brought "for the purpose of restraining the assessment or collection" of any federal tax (26 U.S.C. 7421(a)). That ancient federal statute plainly does not bar jurisdiction over suits brought by the United States in federal courts to obtain collection of federal taxes; it bars only suits brought by taxpayers seeking to restrain the United States from assessing or collecting such taxes. The history of the Tax Injunction Act similarly reflects a concern only with actions filed by taxpayers to enjoin

state collection, not with actions brought by governments to obtain collection of taxes.

If, however, the Tax Injunction Act were applicable to this tax collection case, respondents would not qualify for the exception that may be available to an "instrumentality" of the United States under this Court's decision in *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997). A federal judge is not acting as an "instrumentality" of the United States in challenging a nondiscriminatory tax that has been assessed against the judge personally, rather than against the United States. A nondiscriminatory tax assessed on the personal income of a federal officer is not a tax imposed on an instrumentality of the United States.

For similar reasons, the district court in any event lacked jurisdiction in this case under the federal removal statutes. A state or local tax imposed on income received by a federal judge does not challenge any action taken by the judge "under color of office" (28 U.S.C. 1442(a)(3)). Because an action to collect taxes owed on the personal income of federal judges is not within the removal jurisdiction of the federal courts, this case should be remanded to state court.

2. On the merits, the tax imposed by the County upon the wages of federal judges does not violate the Supremacy Clause. Congress has expressly consented to the imposition of local taxes on the income of federal judges and all other federal officers and employees in the Public Salary Tax Act, 4 U.S.C. 111. Under that Act, "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensa-

tion." *Ibid.* This Act was enacted by Congress for the very purpose of authorizing the sort of nondiscriminatory state and local tax on income imposed in this case.

The court of appeals erred in reasoning that the county tax is imposed on the occupational "privilege" of working as a federal judge, rather than on the "pay or compensation" of such a judge. As this Court has consistently held, whether a local tax is imposed upon "pay or compensation" within the scope of the consent granted by the Public Salary Tax Act depends upon the practical operation of the tax. In its practical operation, the tax challenged in this case is not on the "privilege" of being a judge but is on the "pay or compensation" received by a judge. It thus falls squarely within the consent to local taxation of federal employees that Congress provided in the Public Salary Tax Act.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION IN THIS CASE

1. a. The Tax Injunction Act was first enacted in 1937. It specifies that, so long as a "plain, speedy and efficient remedy" is available in state court, "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" (28 U.S.C. 1341). In decisions such as *Arkansas v. Farm Credit Services*, 520 U.S. 821, 826-827 (1997), this Court has emphasized that this statutory text "is to be enforced according to its terms" and should be interpreted to advance "its purpose" of "confin[ing] federal-court intervention in state government." Accordingly, because there "is little practical difference" between an injunction and anticipatory relief in the form of a declaratory judgment, the Court has concluded that declaratory relief is encompassed within the express

statutory bar against injunctions. *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

This Court has never suggested, however, that the express limitations in the statutory text may simply be ignored. By prohibiting actions to enjoin, restrain or suspend state tax collection, the statute unquestionably evidences a broad intention to bar "anticipatory relief against state tax officials in federal court." *California v. Grace Brethren Church*, 457 U.S. at 408. The plain text of the statute "does not, however, preclude federal court jurisdiction over a suit brought to collect a state tax rather than to enjoin, suspend, or restrain the collection of taxes." *Irving Indep. Sch. Dist. v. Packard Properties, Ltd.*, 741 F. Supp. 120, 122 (N.D. Tex. 1990), *aff'd*, 970 F.2d 58 (5th Cir. 1992). Accord, *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 818 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990); *Pendleton v. Heard*, 824 F.2d 448, 451 (5th Cir. 1987). "While a suit seeking declaratory relief can fall within the scope of [the statute's] prohibition, * * * [28 U.S.C.] 1341 is inapplicable" to cases that seek "not to inhibit the collection of taxes, but to require the collection of additional taxes." *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301, 1303-1304 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980).

b. In *Keleher v. New England Telephone & Telegraph Co.*, 947 F.2d 547 (2d Cir. 1991), however, when a city brought an action in federal court to obtain a declaration that its tax was enforceable and also to obtain the back taxes due, the Second Circuit concluded that the Tax Injunction Act barred the entire case from federal court. Relying on its perception of the historical

objectives of the statute, the court concluded (*id.* at 551):²

[I]n removing the federal courts' power to "enjoin, suspend or restrain" state and local taxes, [Congress] necessarily intended for federal courts to abstain from hearing tax enforcement actions in which the validity of a state or local tax might reasonably be raised as a defense.

The history of the Tax Injunction Act, however, does not reflect an intention that the statute be interpreted in a manner that deprives its textual limitations of meaning. Although the Act plainly sought to limit the ability of federal courts "to interfere with so important a local concern as the collection of taxes" (*Franchise Tax Bd. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 338 (1990) (quoting *Roswell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981))), the Act also plainly did not seek entirely to divest the federal courts of any and all jurisdiction over state tax matters. Instead, Congress chose a more narrowly formulated text that reflects its particular legislative concerns.

In drafting this statute in 1937, Congress expressly modeled it upon "statutes of similar import" previously enacted by Congress that parallel the state laws that "forbid actions in state courts to enjoin the collection of

² The court further stated in the *Keleher* case that "[e]ven if Congress did not intend the Act's jurisdictional bar to reach so far, * * * we believe that general principles of federal court abstention would nonetheless require us to stay our hand here." 947 F.2d at 551. In *Keleher*, however, unlike in the present case, the merits of the tax controversy turned on "difficult questions of state law" (*ibid.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976))) rather than on the interpretation of federal statutory and constitutional provisions.

State and county taxes" and that remit taxpayers to "refund actions after payment under protest." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). The federal statute "of similar import" upon which the Tax Injunction Act was thus modeled is Section 10 of Chapter 169 of the Act of March 2, 1867, 14 Stat. 475, which is now codified at 26 U.S.C. 7421(a). In language that Congress incorporated into the text of the Tax Injunction Act, this ancient statute has specified since 1867 that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." *Ibid.* It is, of course, obvious that this longstanding provision of federal law does not preclude a suit *by the United States* to obtain collection of a tax. The state laws to which Congress referred in enacting the Tax Injunction Act (S. Rep. No. 1035, *supra*, at 1) also obviously do not preclude the States from enforcing their taxes in the courts. The state and federal provisions upon which Congress modeled the Tax Injunction Act bar only anticipatory actions brought by taxpayers that seek to enjoin the government from taking the ordinary steps required to obtain collection of the tax. These state and federal statutes have never been interpreted to preclude a taxpayer from *defending* a suit brought by a government to obtain collection of the tax.

Nor does the history of the Tax Injunction Act support a conclusion that its express textual limitations should be ignored. The two principal concerns expressed in the legislative history were (i) the elimination of unjust discrimination between citizens of the State who were precluded by state laws from obtaining pre-enforcement injunctive relief (S. Rep. No. 1035, *supra*, at 2) and (ii) the need to prevent foreign corporations from commencing an injunction action as a shield

for a refusal to pay taxes as they come due (*ibid.*). See also H.R. Rep. No. 1503, 75th Cong., 1st Sess. 1-2 (1937). In emphasizing that such suits for anticipatory or injunctive relief would be precluded under the Tax Injunction Act, the House Report on that Act further noted that various types of *non*-injunctive actions involving state taxes could properly arise in federal courts. The Report noted that "[t]he right under State law to recover illegal taxes may be enforced in Federal court if jurisdictional elements exist" and quoted the holding of this Court in *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481, 486 (1913), that a state tax refund suit may be brought in federal court, "no less than in the State courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy were present" (H.R. Rep. No. 1503, *supra*, at 3).

While Congress was thus plainly aware that state tax issues could arise and be litigated in several different contexts, the language that Congress utilized in the Tax Injunction Act bars federal courts only from the type of pre-collection injunction suits that other state and federal statutes had already addressed. While anticipatory suits seeking to *restrain* collection are barred under these statutes, they (i) do not bar actions brought by the government to *obtain* collection, (ii) do not prevent a taxpayer from defending in a collection suit by contending that the tax is invalid, and (iii) do not preclude an independent action by a taxpayer to sue for a refund of taxes already paid.³ Notwithstanding

³ While the Tax Injunction Act does not, by its terms, bar suits in federal court for the refund of state taxes, federal courts apply "principles of abstention that were developed before enactment of the Tax Injunction Act" to allow state courts to resolve questions

Congress's express awareness of these alternative forms of action, neither the history nor the text of the Tax Injunction Act reflects an intention to preclude such non-injunction actions in federal court.

2. If this Court were nonetheless to conclude that the Tax Injunction Act applies to a tax collection action brought by the taxing authority, the Act would then bar the present suit. Respondents do not qualify for any exception to that Act.

In *Arkansas v. Farm Credit Services*, 520 U.S. at 824, 828-831, this Court noted that the Tax Injunction Act does not bar an action by the United States to challenge a state tax and that, in some circumstances,

of state law presented in such cases. *Kistner v. Milliken*, 432 F. Supp. 1001, 1005 (E.D. Mich. 1977) (citing, e.g., *Matthews v. Rodgers*, 284 U.S. 521 (1932)). But see *United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323, 327 (5th Cir. 1979) (refund suits barred by Tax Injunction Act). As the court explained in *Kistner v. Milliken*, 432 F. Supp. at 1005:

Being an action for monetary compensation, a refund action does not pose the same threat to the state's fiscal integrity as does an action for anticipatory relief. In an action for refund, the court is not bound by the jurisdictional bar of the Tax Injunction Act, but by the judicial doctrine of abstention, and there may be cases in which a court should exercise its discretion to accept jurisdiction of a refund action.

In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 115 (1981), this Court held that the doctrine of "comity" precludes federal courts from considering damage claims against state governments under 42 U.S.C. 1983 for the unconstitutional administration of state tax provisions. In so holding, the Court made clear that it relied on principles that pre-dated enactment of the Tax Injunction Act and not on that Act "standing alone." 454 U.S. at 107. More recently, the Court explained that the *Fair Assessment* case concerned only "the scope of the 1983 cause of action * * *, not the abstention doctrines." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 719 (1996).

an "instrumentality" of the United States may also be entitled to bring a similar suit. The Court has not decided whether a federal "instrumentality" could proceed in such a suit without the United States joining as a co-plaintiff. *Id.* at 831. The Court has concluded, however, that, to qualify as an "instrumentality," the claimant must, at a minimum, be exercising governmental authority and not be involved in matters that concern only "private" or "commercial interests." *Ibid.*

It is, of course, beyond question that federal judges exercise governmental authority when acting in their official capacity. It is also, of course, evident that judges, in the management of their personal affairs, sometimes act in their own private or commercial interest. In challenging a nondiscriminatory local tax imposed on their private incomes, judges are acting in their private, not official capacities. They are therefore not acting as "instrumentalities" of the United States in this suit.

A tax imposed on a judge's private income is not imposed directly or indirectly on the United States or upon any government activity. This Court has long held that imposition of a nondiscriminatory state tax on the income of federal officers and employees does not implicate the sovereign interests of the United States and does not derogate from federal government authority. Since the decision in *Graves v. New York*, 306 U.S. 466, 480 (1939), this Court has made clear that "only those taxes that [are] imposed directly on one sovereign by the other or that discriminate[] against a sovereign or those with whom it deal[s]" implicate the sovereign interests of the United States. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 811 (1989). See pp. 21-23, *infra*.

The application of a nondiscriminatory state tax to the wages of federal officers or employees thus does not fall upon, or implicate the governmental interests of, the United States or its instrumentalities. A suit brought by respondents to challenge application of the tax to them personally would not represent a suit by a federal "instrumentality" and would not qualify under any exception to the Tax Injunction Act.

3. For essentially the same reasons, this case was not properly removed from state court. The applicable removal statute permits removal only when a federal officer is sued in state court for actions taken "under color of office or in the performance of his duties." 28 U.S.C. 1442(a)(3). Respondents cannot maintain that their "duties" required them to refuse to pay the nondiscriminatory local tax; nor can they maintain that their refusal to pay that tax was an act taken "under color of office." It was a private action based upon the claim of respondents that federal law precludes imposition of the tax.

The availability of a potential federal defense to a state cause of action does not alone justify removal. In addition to a "colorable" federal defense (*Mesa v. California*, 489 U.S. 121, 129-135 (1989)), the federal officer must show that the suit was brought in state court "out of the acts done by him under color of federal authority" (*id.* at 131-132 (quoting *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33 (1926))). See also *Mesa v. California*, 489 U.S. at 135 (the suit must be brought "against a federal officer for acts done during the performance of his duties"); *Gay v. Ruff*, 292 U.S. 25, 33 (1934) (removal available "only when the person defending caused it to

appear that his defense was that in doing the acts charged he was doing no more than his duty").⁴

The court of appeals erred in concluding (Pet. App. 6-7) that respondents acted in their official capacity in refusing to pay the county tax. The tax on the income of respondents was imposed only upon them personally and not upon the United States or upon any instrumentality of the United States. In refusing to pay that tax, respondents have not acted under any direction from the United States or from any instrumentality of the United States. There is no statutory basis or other source for any "duty" of respondents not to pay the local tax. Nor can respondents properly assert that their private refusal to pay the local tax was done "under color of office" (28 U.S.C. 1442(a)(3)), for no judicial act or proceeding was implicated in their private actions. Any suggestion that respondents' refusal to pay nondiscriminatory local taxes on their personal incomes is "in the performance of [their] duties" is further refuted by the fact that they pay the non-discriminatory state income tax on that same income without objection (Pet. App. 116).

No other basis for removal jurisdiction exists in this case. A federal question raised, as here, only as a defense to a state cause of action does not support removal jurisdiction under 28 U.S.C. 1441(a). *Mesa v. California*, 489 U.S. at 121. Because the district court lacked subject matter jurisdiction, the case should be remanded to state court. 28 U.S.C. 1447(c).

⁴ For example, federal law may provide a defense to a state tort suit by preempting the state law. A federal officer sued in state court for such a state tort would not be entitled to remove the case to federal court unless the suit arose "out of the acts done by him under color or federal authority." *Mesa v. California*, 489 U.S. at 131-132.

II. CONGRESS HAS CONSENTED TO THE TAX ON RESPONDENTS' INCOME AND, THEREFORE, THE SUPREMACY CLAUSE DOES NOT PROTECT THEM FROM THE JEFFERSON COUNTY TAX

1. a. The court of appeals erred in concluding that Congress has not consented to the challenged county tax.⁵ The Public Salary Tax Act unequivocally provides that "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. 111. The history and the text of this provision indicate that a nondiscriminatory local tax imposed on compensation from employment may be applied to any "officer or employee of the United States" (*ibid.*) without regard to whether that tax is

⁵ The court of appeals did not consider whether Congress has consented to the tax under the Public Salary Tax Act of 1939 (4 U.S.C. 111) or the Buck Act (4 U.S.C. 105 *et seq.*) until *after* the court had concluded that the tax violated the constitutional doctrine of intergovernmental tax immunity. As this Court has frequently observed, however, a constitutional issue should be reached only after non-constitutional bases for decision have been resolved. *Califano v. Yamasaki*, 442 U.S. 682, 692-693 (1979); *Bowen v. United States*, 422 U.S. 916, 920 (1975); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960). This practice is rooted in the Court's reluctance to decide "abstract, hypothetical or contingent" constitutional questions. *Thorpe v. Housing Auth.*, 393 U.S. 268, 284 (1969) (quoting *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945)). It is appropriate first to address the question whether Congress has consented to the challenged tax because, if such consent has been given, it is irrelevant whether, in the absence of such consent, the tax would be unconstitutional.

labeled, under state law, as an "occupational" tax, a "privilege" tax or an "income" tax.

The Public Salary Tax Act is intimately connected with the modern development of the constitutional doctrine of intergovernmental tax immunity. See *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 811-812. Under this doctrine, "States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." *United States v. County of Fresno*, 429 U.S. 452, 459 (1977) (footnote omitted). For many years, the intergovernmental tax immunity doctrine was broadly applied to prohibit state taxation of the salaries of officers and employees of the United States (*Dobbins v. Commissioners*, 41 U.S. (16 Pet.) 434 (1842)) and to prohibit federal taxation of the salaries of state officials (*Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870)). See *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 810-812. In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), however, the Court declined to follow these authorities—and implicitly overruled *Collector v. Day*—by holding that the federal income tax could validly be imposed on employees of the New York Port Authority. One year later, in *Graves v. New York*, 306 U.S. at 480, the Court overruled the entire line of cases from *Dobbins v. Commissioners* through *Collector v. Day*. As this Court explained in *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 811:

After *Graves* * * * intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.

The Public Salary Tax Act was considered by Congress during the period when the Court was in the process of narrowing, and ultimately abandoning, the *Dobbins-Day* line of cases. After the Court held in 1938 in *Helvering v. Gerhardt*, *supra*, that the federal government could impose nondiscriminatory taxes on state employees, Congress determined that federal officers and employees should be subject to similar state taxes. In the Public Salary Tax Act (Act of Apr. 12, 1939, ch. 59, § 4, 53 Stat. 575), the predecessor of 4 U.S.C. 111, Congress therefore expressly consented to nondiscriminatory state taxation of the "pay or compensation" of federal officers and employees. See H.R. Rep. No. 26, 76th Cong., 1st Sess. (1939); S. Rep. No. 112, 76th Cong., 1st Sess. (1939).

This Court entered its decision in *Graves* shortly before the Public Salary Tax Act was enacted. The practical effect of the Public Salary Tax Act was thus to codify the result in *Graves* and thereby foreclose "the possibility that subsequent judicial reconsideration of [*Graves*] might reestablish the broader interpretation of the immunity doctrine." *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 812. The purpose of the Act is thus plainly to abandon, not preserve or extend, the immunity of federal officers and employees from nondiscriminatory state taxation.

b. The proper interpretation of the Public Salary Tax Act must, of course, begin with its language. See, e.g., *Bailey v. United States*, 516 U.S. 137, 144 (1995). Under this Act, the United States consents to nondiscriminatory state or local taxation of the "pay or compensation for personal service" received by any "officer or employee of the United States." 4 U.S.C. 111. Because the local ordinance challenged in this case taxes the "pay or compensation" that respondents receive for

the "personal service" they provide as officers of the United States, and does not discriminate in doing so, the tax comes within the plain language of the consent that Congress has given to state and local taxation.⁶

The language of the county ordinance, of course, does more than simply impose the tax. It also states that it is "unlawful for any person" to be employed within the County "without paying" the tax. Jeff. Cty. Ord. 1120, § 2; Pet. App. 132.⁷ The court of appeals held that the tax is beyond the scope of the statutory consent because: (i) under state law, the ordinance imposes a tax on the "privilege" of working, rather than a tax on the "income" received from work (Pet. App. 54-56; see *id.* at 44-45 (citing *McPheeter v. City of Auburn*, 259 So. 2d 833 (Ala. 1972))); and (ii) a tax imposed on the "privilege" of working as a federal judge constitutes a direct tax on the United States to which Congress has not consented (*id.* at 56).

The court of appeals erred, however, in looking to the label, rather than the substance, of the challenged tax. Whether the County's occupational tax is imposed on "pay or compensation" within the scope of the consent granted by the Public Salary Tax Act, 4 U.S.C. 111, is a question of federal law. See *Howard v. Commissioners*

⁶ The district court (Pet. App. 89-90) correctly held that the county tax does not "discriminate against the officer or employee because of the source of the pay or compensation" (4 U.S.C. 111). The en banc court of appeals stated that, "[o]n this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it" (Pet. App. 34 n.9).

⁷ The tax is imposed on the "gross receipts" from employment within the County. That term is defined to mean "compensation" and includes "the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind." Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 131.

of the Sinking Fund, 344 U.S. 624, 628-629 (1953); *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (3d Cir. 1985). This Court has emphasized that, in determining the validity of a state tax whose burden falls upon the federal government or its employees, "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1932). It is therefore necessary to "look through form and behind labels to substance" (*City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 492 (1958)) and to go beyond the "bare face of the taxing statute to consider all relevant circumstances" (*United States v. City of Detroit*, 355 U.S. 466, 469 (1958)). See also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (constitutionality of a state tax on the "privilege of doing business" under the Commerce Clause does not turn merely on the legislative phrasing, for such "formalism merely obscures the question whether the tax produces a forbidden effect").

In its "practical operation" and effect, the county tax is simply a tax on the "pay or compensation" that respondents receive for their services to the United States. The tax is imposed only if a person earns "gross receipts" or receives "compensation" in the form of "salaries, wages, commissions, [or] bonuses" while employed within the County. Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 131. See note 7, *supra*. Even though phrased as a "privilege" tax, it is imposed only on income as it is received. The tax does not operate as a prerequisite or precondition of employment; it is therefore indistinguishable in its practical operation and effect from other forms of income taxation.

The court of appeals was unduly swayed by the language of the ordinance that makes it "unlawful" for a

person not to pay this "privilege" tax (Pet. App. 50-51). It is, by definition, "unlawful" for any person to fail to pay a tax imposed by law. If a State could not make it "unlawful" for a federal officer to fail to pay a tax, the tax could not be enforced; if the tax could not be enforced, it would then hardly be relevant whether Congress had, or had not, consented to it.

The only "punishment" imposed for a failure to pay the county tax is interest and penalties on the unpaid tax. Jeff. Cty. Ord. 1120, § 10; Pet. App. 137-138. The fact that Ordinance 1120, in this manner, makes it "unlawful" for anyone to fail to pay the tax does not take the tax outside the scope of the statutory consent. The tax does not discriminate against federal officers and employees; it is imposed on the "pay or compensation" that they receive from their employment (4 U.S.C. 111); it is therefore within the scope of the statutory consent.

c. The court of appeals erred in distinguishing (Pet. App. 56-57 n.19) the tax imposed by Ordinance 1120 from the "business privilege tax" upheld in *United States v. City of Pittsburgh*, 757 F.2d at 47. There, the City of Pittsburgh imposed a "business privilege tax" on persons doing business in the city at the rate of five mills per dollar of gross receipts. The United States challenged the application of this "privilege" tax to the official transcript fees of a federal court reporter in the United States District Court for the Western District of Pennsylvania. The Third Circuit concluded, however, that the local "privilege" tax was within the scope of the consent provided by the Public Salary Tax Act, 4 U.S.C. 111.

In so holding, the court of appeals found it immaterial that the Pennsylvania Supreme Court had ruled that the local tax was a "privilege" tax rather than an "in-

come tax" under state law. 757 F.2d at 47. The court of appeals held that federal law, not state law, determines whether the local tax is imposed on the "pay or compensation" (4 U.S.C. 111) of a federal officer. 757 F.2d at 47. The court explained that, in enacting the Public Salary Tax Act, Congress intended that federal employees "should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits which are accorded to persons engaged in private occupations." *Ibid.* (quoting S. Rep. No. 112, *supra*, at 4). The court stated that the statutory consent to taxation of the "pay or compensation" of federal officers must be read broadly to comport with that legislative intent. *Ibid.* The court further noted that, in enacting the Public Salary Tax Act, Congress was aware "that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Ibid.* (citing S. Rep. No. 112, *supra*, at 6-10). Because the "business privilege tax" challenged in *City of Pittsburgh* was imposed on the "gross receipts or gross income from the [transcript] fees," the court concluded that Congress had consented to the imposition of the tax under 4 U.S.C. 111. 757 F.2d at 47.

2. The Buck Act, 4 U.S.C. 105 *et seq.*, reinforces this understanding of the scope of the consent to state taxation contained in the Public Salary Tax Act. Under the Buck Act, a person who receives "income from transactions occurring or services performed" in a "Federal area" is subject to "any income tax" levied by a state or local government "to the same extent" as if the income was received in an area that is "not a

Federal area." 4 U.S.C. 106(a).⁸ The term "income tax" is defined for this purpose to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c).

The Buck Act (Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059) and the Public Salary Tax Act were both enacted by the same Congress. In adopting the broad definition of the term "income tax" contained in the Buck Act, Congress was aware that States impose a variety of taxes on income that are designated by terms other than "income tax"—such as "corporate-franchise" taxes or "business-privilege" taxes. S. Rep. No. 1625, 76th Cong., 3d Sess. 5 (1940). Congress sought to ensure that state and local governments are authorized to impose taxes measured by the income or receipts from federal employment regardless of how the tax is labeled or described. *Ibid.*

In *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624 (1953), this Court held that the Buck Act

⁸ The term "Federal area" is defined broadly in the Buck Act to mean "any lands or premises held or acquired by or for the use of the United States." 4 U.S.C. 110(e). This definition appears, by its terms, to encompass premises used by the United States for the purposes of operating a federal courthouse. The origin and purpose of the Buck Act, however, were more limited: that statute was designed to ensure that federal officers and employees who reside or work within exclusive federal enclaves would be treated equally with those who reside and work outside such areas. See S. Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940); *United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301, 309 (3d Cir. 1976). Because the Public Salary Tax Act broadly consents to any tax imposed on the "pay or compensation" of federal employees (4 U.S.C. 111), it is unnecessary for the Court to decide in this case whether the Buck Act itself authorizes application of state and local "income tax[es]" to the salaries of federal judges as compensation for "services performed" in a "Federal area" (42 U.S.C. 106(a)).

consented to the imposition of a municipal "license fee" (of one percent of the wages and "other compensations earned by every person in the City") on employees who worked at a federal ordnance plant. 344 U.S. at 625 n.2. The employees had claimed in *Howard* that the local "license fee" was not an "income tax" within the scope of the Buck Act because the Kentucky Court of Appeals had held that "this tax was not an 'income tax' within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City" (*id.* at 628 (citing *City of Louisville v. Sebree*, 214 S.W.2d 248, 253-254 (1948))). This Court rejected that argument (344 U.S. at 628-629):

[T]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts.

In dissent in *Howard*, Justice Douglas (joined by Justice Black) urged a contrary point of view that is echoed in the reasoning of the court of appeals in the present case (*id.* at 629 (citation omitted)):

I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses, professions, and occupations. Many kinds of income are excluded, *e.g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of Appeals

held it to be. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States.

The decision of the court of appeals in this case errs for the same reason that the Court rejected the formalistic interpretation of the statute proposed by the dissent in *Howard*. Both in substance and practical effect, the county ordinance challenged in this case imposes a tax on income received from federal employment, and nothing more. Congress expressly consented to the imposition of such nondiscriminatory state and local taxes upon the "pay or compensation" of federal officers and employees. 4 U.S.C. 111.

CONCLUSION

If the Court concludes that jurisdiction does not exist in this case, the judgment of the court of appeals should be vacated and the case remanded to state court. If the Court concludes that jurisdiction exists in this case, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH L. WAXMAN

Solicitor General

LORETTA C. ARGRETT

Assistant Attorney General

LAWRENCE G. WALLACE

Deputy Solicitor General

KENT L. JONES

*Assistant to the Solicitor
General*

DAVID ENGLISH CARMACK

Attorney

JANUARY 1999

FOR ARGUMENT

8

Supreme Court, U.S.
FILED

FEB 19 1999

No. 98-10

CLERK

In The
Supreme Court of the United States

October Term, 1998

JEFFERSON COUNTY, ALABAMA,

Petitioner,

v.

WILLIAM M. ACKER, JR. and U. W. CLEMON,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF *AMICI CURIAE* BY SEVEN UNITED STATES
DISTRICT JUDGES OF THE NORTHERN DISTRICT
OF ALABAMA SUPPORTING RESPONDENTS
AND SUGGESTING AFFIRMANCE

CHARLES DuBOSE COLE
800 Lakeshore Parkway
Birmingham, Alabama 35209
205-870-2701

*Counsel of Record for James H.
Hancock, Robert B. Propst, Edwin L.
Nelson, Sharon Lovelace Blackburn,
C. Lynwood Smith, Inge Pritt
Johnson, and H. Dean Buttram, Jr.
Amici Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction over this action, in light of the Tax Injunction Act, 28 U.S.C. § 1341.

2. Whether a county privilege/occupational tax levied upon the pay or compensation of an Article III judge violates the Supremacy Clause.

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INTEREST OF AMICI CURIAE¹

Judges James H. Hancock, Robert B. Propst, Edwin L. Nelson, Sharon Lovelace Blackburn, C. Lynwood Smith, Jr., Inge Pritt Johnson, and H. Dean Buttram, Jr., who submit this brief *amici curiae*, are Article III judges subject to paying Jefferson County's privilege/occupational license fee based on their pay or compensation for work performed by them in Jefferson County, that is, if Ordinance No. 1120 can be enforced against Article III judges. Contrary to the statement contained in the "stipulated facts" at page 7 of petitioner's brief on the merits, none of *amici*, and, in fact, no Article III judge in the Northern District of Alabama, has paid to Jefferson County any money in response to its demands under Ordinance No. 1120 after the decision by the trial court in favor of Judges Acker and Clemon.

At all times pertinent, Judges Hancock, Propst, Nelson, Blackburn, Johnson and Buttram have had their chambers located in Jefferson County. Judge Nelson's voting residence is in St. Clair County. Judge Johnson's voting residence is in Colbert County. Judge Buttram's voting residence is in Cherokee County. Before taking senior status and moving his chambers from Jefferson

¹ In compliance with Supreme Court Rule 37.3(a), Jefferson County, Judge Acker and Judge Clemon, constituting all of the parties in this case, have given their written consents to the filing of this *amici* brief. The said consents have been separately filed. As required by Supreme Court Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than an *amici* has made a monetary contribution to the preparation or submission of this brief.

County to Calhoun County, Judge Propst's voting residence was in Calhoun County. Both Judge Smith's voting residence and his primary chambers have at all times pertinent been in Madison County. Judge Smith has secondary chambers in Jefferson County. Judges Propst, Nelson, and Buttram have, since the effective date of Ordinance No. 1120, been assigned to the statutory division of the Northern District of Alabama which sits in Gadsden, a city that has an occupational tax very similar to Ordinance No. 1120, although Gadsden has never sought to enforce its ordinance against any Article III judge who earned income as a result of judicial time spent in Gadsden. The amount of judicial time spent by the seven *amici* in Jefferson County varies between judges and varies by individual judge from year-to-year depending on assignments among the eight federal courthouses in the Northern District, only one of which is located in Jefferson County.

If Judges Acker and Clemon should lose this case on the merits, whether in this court or in a state court upon a remand based on lack of federal jurisdiction, AND if the class certified by an Alabama state trial court in *Richards v. Jefferson County*, 517 U.S. 793 (1996), on remand from this Court, should lose on Jefferson County's present appeal of the recent ruling that Ordinance No. 1120 is unconstitutional across-the-board, each *amici* would owe some undetermined and difficult-to-compute amount of unpaid occupational license fee to Jefferson County, plus penalty.

CERTIFICATE OF INTERESTED PERSONS

Jefferson County's list of interested persons is correct as far as it goes. However, it fails to mention *amici*, namely, Judges Hancock, Propst, Nelson, Blackburn, Smith, Johnson and Buttram, all of whom are not only manifestly interested in this case as demonstrated by their statement of interest, *supra*, but some of whom have previously manifested that interest to the extent of filing a brief *amici curiae* in the Court of Appeals for the Eleventh Circuit in support of the positions there taken by Judges Acker and Clemon. All Article III judges, including appellate judges, who have sat or performed judicial functions in Jefferson County since the enactment of Ordinance No. 1120, are interested. Several Article III judges not regularly assigned to the Northern District of Alabama have sat for considerable periods of time in Jefferson County and are therefore exposed to the civil and criminal liabilities of Ordinance No. 1120. Also, clergypersons who earn income from activities in Jefferson County, and who are now being treated by Jefferson County as immune from the effect of Ordinance No. 1120, are interested. If the ordinance is, in fact, an income tax, as Jefferson County and the United States now argue, rather than a privilege or license fee, the constitutional prohibition against a State's licensing of ministers, based upon the First Amendment, as made applicable to the States by the Fourteenth Amendment, would not be implicated, and clergypersons will lose the favorable treatment they now enjoy.

STATEMENT OF THE CASE

Amici adopt the statements of the case by respondents, Judges Acker and Clemon, by petitioner, Jefferson County, and by *amicus curiae*, United States.

SUMMARY OF ARGUMENT

1. In granting *certiorari*, this Court submitted only one jurisdictional issue to the litigants for their comment, namely, what effect, if any, does the Tax Injunction Act have on the federal court's subject matter jurisdiction over this case. *Amici curiae* joins the United States and respondents in submitting that the Tax Injunction Act has no application whatsoever to the procedural facts in this case.
2. If, as *amici* submit, the federal court does have jurisdiction, Jefferson County's privilege/occupational tax, contained in its Ordinance No. 1120, constitutes a significant burden on Article III judges in contravention of the Supremacy Clause and constitutes a sufficiently discriminatory burden to exempt the ordinance from the exemption which otherwise might be provided by the Public Salary Tax Act.

ARGUMENT

- I. **The Tax Injunction Act does not preclude federal court jurisdiction upon removal of these collection actions brought by Jefferson County in state court against Judges Acker and Clemon.**

When this Court granted Jefferson County's petition for a writ of *certiorari*, this Court expressly limited its

grant to two questions. The first of these questions, which if answered in the negative, will obviate the second question, is: "Whether the district court had subject matter jurisdiction over this action, in light of the Tax Injunction Act, 28 U.S.C. § 1341." (emphasis supplied). This Court deliberately did not ask the parties for criticism of or support for the Eleventh Circuit's determination that the removals by Judges Acker and Clemon from state court to federal court pursuant to 28 U.S.C. § 1442(a)(3) were efficacious. This Court asked only that the parties address the effect, if any, of the Tax Injunction Act on the question of the right of Judges Acker and Clemon to remove to federal court.

Amici agree with the United States and are grateful for its brief *amicus curiae* when it says, in response to this Court's specific question, that the Tax Injunction Act does not stand in the way of federal jurisdiction over these two consolidated cases, neither of which contained a prayer for declaratory or injunctive relief. *Amici* disagree with Jefferson County on the same subject, but before elaborating on that disagreement, *amici* respectfully point out that the United States in its statement of the issues has conspicuously reframed this Court's carefully framed first query, apparently in order to justify the tangential expression by the United States of its opinion concerning the availability of 28 U.S.C. § 1442(a)(3) as a basis for Judge Acker's and Judge Clemon's removals. While tempted to respond immediately to the non-responsive argument made by the United States about § 1442(a)(3), *amici* will honor the limitation unequivocally imposed by this Court and will assume that this Court is satisfied with what the Eleventh Circuit said respecting § 1442(a)(3).

Starting with *amici's* belief that this Court is already convinced that Judges Acker and Clemon had access to the federal court *unless* precluded by the Tax Injunction Act, *amici* respectfully suggest, as does the United States, that the Tax Injunction Act is not implicated in this case. *Amici* go further and, in response to this Court's unequivocal question, suggest that *if* the Tax Injunction Act is implicated, it does not preclude removal jurisdiction here for the reasons articulated by this Court in *Willingham v. Morgan*, 395 U.S. 402 (1969). There, this Court lucidly explained the reasons why Congress enacted § 1442(a)(1), reasons which apply with equal force to § 1442(a)(3). This Court said in *Willingham*:

The federal officer removal statute is not 'narrow' or 'limited.' *Colorado v. Symes*, 286 U.S. 510, 517, 52 S.Ct. 635, 637, 76 L.Ed. 1253 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute – as its history clearly demonstrates – was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words 'under color of * * * office.' In fact, *one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a*

federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).

Willingham v. Morgan, 395 U.S. 406-407 (1960). (emphasis supplied).

If, contrary to the position now being taken by the United States, § 1341 applies to a case like this one, § 1442 overrides it. The Tax Injunction Act, § 1341, **deprives** federal courts of jurisdiction, whereas the removal statute, § 1442, **grants** federal courts jurisdiction. A universally recognized rule of statutory construction applies here, proving the dominance of § 1442 over § 1341, to the extent the two statutes may conflict. "Statutes which **deprive** courts of jurisdiction are strictly construed . . . On the other hand, a liberal interpretation is accorded statutes purporting to **extend** the jurisdiction of a court." *Sutherland Stat. Const.* § 67.03 (5th Ed. 1992). (emphasis supplied).

Although there was a dissenting view expressed by the Eleventh Circuit in the instant case on the Supremacy Clause question, the Eleventh Circuit was **unanimous** in its belief that it and the trial court had subject matter jurisdiction over this controversy. In other words, the Eleventh Circuit has given a unanimous affirmative answer to this Court's first query. *Amici* respectfully suggest that the unanimous Eleventh Circuit was correct.

When Jefferson County argues that the Tax Injunction Act precludes Judges Acker's and Clemon's access to federal court because the United States, a non party, did not itself join them in the notice of removal, Jefferson County's contention is clearly **contra** to the position of

the United States. However, if by **analogy** to the Tax Injunction Act, there is colorable merit to petitioner's argument that federal courts are precluded from ruling on the constitutionality of a state tax collection effort unless the federal government itself timely intervenes or is the complaining party, *amici* respectfully point out that in the *amicus* brief filed by the United States with the Ninth Circuit in *California Credit Union League v. City of Anaheim*, 95 F.3d 30 (9th Cir. 1996), the United States, which was *not* a party to that case at the time, (1) supported a claim of exemption by a group of federal credit unions from a local tax, said exemption being based on the Supremacy Clause, and (2) did not challenge or even hint at a lack of jurisdiction. The United States began its *amicus* brief in *California Credit Union League* with this pointed sentence: "Federal credit unions are instrumentalities of the United States engaged in the performance of important functions." *Amici* invite this Court to read the entire *amicus* brief of the United States in *California Credit Union League* if the Court has not taken the opportunity to do so.² *Amici* hope that the United States and Jefferson County are willing to acknowledge that Article III judges are "instrumentalities of the United States engaged in the performance of important functions." *Amici* would like to think that their functions are as important as those performed by a federal credit union. If so, that should be dispositive of the issue addressed in *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997). In response to a petition for

² A copy of the *amicus* brief of the United States in *California Credit Union* has been lodged with the Court.

writ of certiorari in the *California Credit Union League* case, Supreme Court Case No. 96-936, this Court remanded the case to the Ninth Circuit simultaneously with the remand of the instant case to the Eleventh Circuit for reconsideration in light of *Farm Credit Services*, and for the same reason. The position taken by the United States in *California Credit Union League* may or may not be consistent with its position in this case, but it cannot be reconciled with the position Jefferson County takes here.

II. Jefferson County's privilege/occupational tax levied on the pay or compensation of an Article III judge violates the Supremacy Clause.

The cornerstone argument, both of Jefferson County and of the United States, insofar as the effect of the Supremacy Clause on Ordinance No. 1120 is concerned, is that the ordinance is, in reality, an income tax as to which the United States has waived intergovernmental tax immunity by virtue of the Public Salary Tax Act. In the second limited question put by this Court, it describes Ordinance No. 1120 as a "privilege/occupational tax," using the same descriptive language that Jefferson County uses in the ordinance itself, that never employs, because it cannot, the descriptive term "income tax." Jefferson County and the United States argue that Ordinance No. 1120 is not really what it purports to be, namely, a "privilege/occupational tax", but, instead, an "income tax." There are several flaws in this argument.

First, Alabama categorically forbids a county government from enacting an income tax. Jefferson County

enjoys no exemption from this express state statutory and constitutional prohibition, although it is at this very moment busily engaged in a desperate attempt to obtain the enactment of remedial legislation to correct or replace what a state trial court has found to be an invalid ordinance.³ Whether Jefferson County's proposed legislation will enable it to enact an "income tax" remains to be seen.

Second, there would be no purpose for the express language in Ordinance No. 1120, which makes "unlawful" an unlicensed activity performed in Jefferson County, if the intent were not to require a person to obtain Jefferson County's formal permission to perform the activity before the person can perform it in Jefferson County. The ordinance has the generally recognized characteristics of a licensing scheme.

Third, a tax which expressly exempts from its effect every person holding a state license authorizing that person to perform an occupation in the state, without regard to how small the state license fee is in comparison to the dollar figure ordered to be paid to Jefferson County, cannot objectively or fairly be viewed as an income tax. Income taxes simply do not exempt vast numbers of taxpayers living and/or working within the taxing jurisdiction.

Fourth, if Ordinance No. 1120 were an income tax, clergypersons would be subject to it. By the terms of this ordinance ministers enjoy no exemption. Under the prohibition of the First Amendment, made applicable to the States by the Fourteenth Amendment, neither the State of

³ See *The Birmingham News*, January 13, 1999.

Alabama nor Jefferson County can grant or deny a license to preach. Therefore, Jefferson County, by allowing its ministers to be exempt for clear constitutional reasons, is confessing that Ordinance No. 1120 is not an income tax.

Fifth, and finally, income taxes have historically discriminated, if at all, on the basis of the **amount** or **type** of income. In other words, there is nothing unconstitutional about progressive income taxation or exempting certain sources of income. However, Ordinance No. 1120 is not progressive taxation. If, contrary to logic and the English language, this ordinance is an "income tax", it is unique in that it entirely exempts a large portion of the workforce from taxation. Some of the exempted groups generate very sizeable income from work performed in Jefferson County.

Only if Jefferson County has accomplished what the State of Alabama forbids, namely, enacting an "income tax", does this Court reach the question of the applicability of the Public Salary Tax Act, 4 U.S.C. § 111. The Buck Act, 4 U.S.C. §§ 105 *et seq.*, is so clearly inapplicable that *amici* will not discuss it. Apparently the United States, if not Jefferson County, concedes that the Buck Act does not apply.

Amici will assume *arguendo* that Congress has the power to waive the intergovernmental tax immunity of an Article III judge despite the Supremacy Clause. To avail itself of any such waiver provided by the Public Salary Tax Act, Jefferson County must demonstrate that its "taxation does not discriminate against [Judges Acker

and Clemon] because of the source of the pay or compensation." 4 U.S.C. § 111. A reading of this statute necessarily leads to a consideration of whether Ordinance No. 1120 "discriminates" against Article III judges.

Amici hope that it is clear to the Court that there will be a substantial economic burden placed upon Article III judges if Ordinance No. 1120 is applied to them, not only by making them pay to Jefferson County one-half of a percent of their salaries and other emoluments earned, **no matter whether actually received or not**, for work performed in Jefferson County, but by the time-keeping and reporting requirements arising from the fact that they hold office in a federal court district that includes thirty-one counties. Some of *amici* reside in Jefferson County and some do not. Not only do two *amici* not reside in Jefferson County, but they have their primary chambers in other counties. The mere thought of the onerous requirement of time-keeping and reporting under oath as to the portion of judicial salary attributable to work performed in Jefferson County, leaves Article III judges legitimately feeling uncomfortable and vulnerable, especially when perjury is an impeachable offense.

Kin to, if not identical to, Supremacy Clause immunity, is the general principle stated in *Forrester v. White*, 484 U.S. 219 (1988):

Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Running through

our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and **we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.**

108 S. Ct. 542. (emphasis supplied). This concept was recognized long before *Forrester v. White*. As early as 1872, this Court held that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, **without apprehension of personal consequences to himself.**" *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L.Ed. 646 (1872). (emphasis supplied). If Ordinance No. 1120 applies to Article III judges, there is no way to avoid personal consequences for the judges, not the least of which is the decision as to where to hold court.

The United States and Jefferson County argue, of course, that Congress has successfully waived the separation of powers inherent in the Supremacy Clause insofar as Ordinance No. 1120 is concerned, not only because the ordinance is really an "income tax," but because the ordinance does not discriminate against Article III judges. Any time a statute uses the word "discriminate," as 4 U.S.C. § 111 does, a return to the dictionary may be helpful. The word "discriminate" means: "to make a difference in treatment or favor (of one as compared to

others)." This, of course, means that if others are preferred over Article III judges, the judges are the victims of discrimination. Although Ordinance No. 1120 does not *expressly* discriminate against Article III judges, in practical effect it does just that. Discrimination in favor of one group is discrimination against those not in that group. The Jefferson County attorney, who receives a salary almost twice the size of that of a federal district judge,⁴ pays no occupational license fee whatsoever under Ordinance No. 1120, because the ordinance exempts lawyers. Instead, he pays \$250 per year to the State of Alabama for his law license. Because *amici* are no longer licensed to practice law, Ordinance No. 1120 purports to require them to pay approximately \$650 per year to Jefferson County unless they are willing to try to reduce that amount by filing a sworn statement saying that they spent a hard-to-prove, specific percent of their quarterly judicial time outside of Jefferson County.

The Public Salary Tax Act is no more than a Congressional confirmation of the right of a State to impose a "general" income tax on federal officials, including judges. This Court noted in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939):

To subject them [federal judges] to a *general* tax is merely to recognize that judges are also citizens.

(emphasis supplied). It cannot be argued that Ordinance No. 1120 is a "general" tax. *Amici* and both respondents willingly pay Alabama's general income tax.

⁴ See *Birmingham Post Herald*, January 23, 1999.

The United States in its brief has chosen to believe Jefferson County's claim that Ordinance No. 1120 has no criminal penalties. The oral assurance by Jefferson County that it will never seek criminal penalties for a violation of its ordinance that makes it "unlawful" for *amici* to engage in the occupation of an Article III judge without Jefferson County's license is not enough to relieve *amici* of genuine apprehension and a sense that they are receiving unfair treatment that is grossly unequal in comparison to those many persons who are licensed by the State of Alabama and are therefore not subject to possible arrest for engaging in their occupations in Jefferson County.

In final analysis, Ordinance No. 1120 discriminates among occupations. Article III judges are among the occupations discriminated against. The fact that other occupations are also discriminated against does not alter the fact that Article III judges are discriminated against. They do not have to be the specific, named targets of unequal treatment to be eliminated from the waiver contained in the Public Salary Tax Act.

CONCLUSION

Amici respectfully ask this court to affirm both the Eleventh Circuit's holding that the district court had jurisdiction and its holding that Ordinance No. 1120 is unconstitutional as applied to Article III judges. Alternatively, if this Court does not agree that Ordinance No. 1120 is unconstitutional as applied, *amici* respectfully

suggests that this case should be remanded to the Eleventh Circuit to obtain its opinion on the diminution of compensation question which the trial court addressed but which the Eleventh Circuit did not address.

Respectfully submitted,

CHARLES DuBOSE COLE
800 Lakeshore Parkway
Birmingham, Alabama 35209

*Counsel of Record for James H.
Hancock, Robert B. Propst, Edwin L.
Nelson, Sharon Lovelace Blackburn,
C. Lynwood Smith, Inge Pritt
Johnson, and H. Dean Buttram, Jr.
Amici Curiae*